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JOHN F. DAVIS, C

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 490.

SAMUEL H. SHEPPARD,

Petitioner,

—vs.—

E. L. MAXWELL, Warden,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION, *AMICI CURIAE*

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TABLE OF CONTENTS

PAGE

Interest of *Amici* 1

Statement of Facts 4

Summary of Argument 10

Argument 11

I. Damaging Publicity Induced by Law Enforcement Authorities 17

II. Damaging Publicity Describing Prosecution Evidence Which Varies Materially from That Introduced at Trial by the Prosecution 19

III. Damaging Publicity Describing Prosecution Evidence Which Would Be Inadmissible in Court 21

IV. Publicity Which Makes Celebrities of the Trial Jurors 23

V. Accusatory Publicity Which Charges Guilt or Attacks the Character or Reputation of the Accused 25

Conclusion 28

APPENDIX:

Opinion of the District Court 1a

TABLE OF AUTHORITIES

PAGE

Cases

Adamson v. California, 332 U. S. 46 (1947) 12
Alcorta v. Texas, 355 U. S. 28 (1957) 19

Beck v. Ohio, 379 U. S. 89 (1964) 19
Brady v. Maryland, 373 U. S. 83 (1963) 19
Bridges v. California, 314 U. S. 252 (1941) 2, 11, 26, 27

Cox v. Louisiana, 379 U. S. 559 (1965) 12
Craig v. Harney, 331 U. S. 367 (1947) 2, 11

Escobedo v. Illinois, 378 U. S. 478 (1964) 17
Estes v. Texas, 381 U. S. 532 (1965) 3, 10, 12, 13, 14, 15, 24

Fay v. Noia, 372 U. S. 391 (1963) 3
Freeman v. New York Central R. R. Co., 15 Ohio Op. 2d 187 (App. Lucas 1960) 22

Gideon v. Wainwright, 372 U. S. 335 (1963) 10, 12, 13
Griffin v. California, 380 U. S. 609 (1965) 12, 19, 22

Irvin v. Dowd, 366 U. S. 717 (1961) 2, 3, 12, 13, 18, 19

Jackson v. Denno, 378 U. S. 368 (1964) 12
Janko v. United States, 366 U. S. 716 (1961) 3, 12

Mapp v. Ohio, 367 U. S. 643 (1961) 19
Marshall v. United States, 360 U. S. 310 (1959) 3, 12
Mooney v. Holohan, 294 U. S. 103 (1935) 16, 19
Murchison, In re, 349 U. S. 133 (1955) 10, 13

Napue v. Illinois, 360 U. S. 264 (1959) 19

PAGE

Ohio v. Smith, 113 Ohio App. 461 (Lucas 1960) 22

Parker v. Friendt, 99 Ohio App. 329 (Cuyahoga 1954) .. 22
Patterson v. Colorado, 205 U. S. 454 (1907) 4, 21
Pennekamp v. Florida, 328 U. S. 331 (1946) 2, 11, 15, 20
Pointer v. Texas, 380 U. S. 400 (1965) 12

Rideau v. Louisiana, 373 U. S. 723 (1963) 3, 10, 12, 13, 14, 15, 18

Shepherd v. Florida, 341 U. S. 50 (1951) 3, 12, 18, 20
Sheppard v. Maxwell, 231 F. Supp. 37 (S. D. Ohio 1964) 9
Sheppard v. Ohio, 352 U. S. 910, 955 (1956) 8
State v. Sheppard, 100 Ohio App. 345, 128 N. E. 2d 471 (1955) 8
State v. Sheppard, 100 Ohio App. 399, 128 N. E. 2d 504 (1955) 8
State v. Sheppard, 164 Ohio St. 428, 131 N. E. 2d 837 (1956) 8
State v. Sheppard, 165 Ohio St. 293, 135 N. E. 2d 340 (1956) 6, 8
State ex rel. Sheppard v. Alvis, 170 Ohio St. 551, 167 N. E. 2d 94 (1960) 9
Stroble v. California, 343 U. S. 181 (1952) 3, 12, 13, 15, 18

Townsend v. Sain, 372 U. S. 293 (1963) 3
Tumey v. Ohio, 273 U. S. 510 (1927) 10, 13
Turner v. Louisiana, 379 U. S. 466 (1965) 10, 13

White v. Maryland, 373 U. S. 59 (1963) 10, 13
Wood v. Georgia, 370 U. S. 375 (1962) 2, 11

PAGE

Constitution

Constitution of the United States:
First Amendment 1, 27
Fifth Amendment 22
Sixth Amendment 12, 22, 25
Fourteenth Amendment 1, 12, 25

Miscellaneous

Annotation, 23 ALR 2d 1308 22

Douglas, J., *The Public Trial and the Free Press,* 33 Rocky Mt. L. Rev. 1 (1960) 4

Padover, Democracy, 150-151 26

Report of The President's Commission on the Assassination of President John F. Kennedy (1964), pp. 231-242 ..... 3, 18

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION, *AMICI CURIAE*

Interest of *Amici*

The American Civil Liberties Union and its Ohio affiliate, the Ohio Civil Liberties Union, are organizations dedicated to the preservation of a free and open society, principally through the protections embodied in our Bill of Rights and the Fourteenth Amendment to the United States Constitution.

For many years, the American Civil Liberties Union and its affiliates have fought to defend and extend the First Amendment guarantees of freedom of speech and press, upon the clear principle that a free society cannot exist unless the persons within its boundaries are permitted—rather, encouraged—to express themselves by word and in print without fear of governmental restraint.

We note the significant role that a free press plays in helping to establish and preserve that free society; nothing which follows diminishes in any respect our full support

for the broadest latitude of public expression in the news media and elsewhere. This Court has amply demonstrated its own dedication to these principles.[1] But it is equally clear that freedom without justice is an empty view. "The safety of society and the security of the innocent alike depend upon wise and impartial criminal justice. Misuse of its machinery may undermine the safety of the State; its misuse may deprive the individual of all that makes a free man's life dear."[2] It has been observed that "not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community."[3]

The point at which free press and fair trial intersect in the administration of criminal justice—the notorious criminal trial amidst inflammatory publicity in an aroused community—presents serious and complex problems to those who would defend the principles of both freedom and justice. As the quantum and the techniques of the communications media continue to expand, as the public thirst for the contemporaneous details of notorious criminal trials continues unslaked, the quality of criminal justice in the courts of our land will be subjected to ever-increasing stresses unless this Court provides detailed working principles to guide the trial courts of the states (as well as the federal courts which it directly supervises) in the administration of this most difficult task.

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[1] See *Bridges* v. *California*, 314 U. S. 252 (1941); *Craig* v. *Harney*, 331 U. S. 367 (1947); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Wood* v. *Georgia*, 370 U. S. 375 (1962).

[2] *Pennekamp* v. *Florida*, 328 U. S. 331, 357 (1946) (concurring opinion).

[3] *Irvin* v. *Dowd*, 366 U. S. 717, 729 (1961) (concurring opinion).

In recent years, this question has been thrust forcibly and dramatically before the attention of the American public.[4]

This Court, on a case by case basis, has already begun the task of weighing the delicate due process considerations involved when a notorious criminal trial takes place in a community inflamed by massive prejudicial publicity.[5]

The case at bar provides the Court with yet a further opportunity to analyze and refine working constitutional principles to guide the trial courts through this most sensitive area of criminal due process. For, through the auspices of the Great Writ,[6] a number of varieties of prejudicial trial and pretrial publicity have been preserved for review by this Court.

In the firm belief that this case presents a clear opportunity for this Court to further delineate the federal constitutional standards of criminal due process as they relate

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[4] *Report of The President's Commission on the Assassination of President John F. Kennedy* (1964), pp. 231-242. "The experience in Dallas * * * is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial." P. 242.

[5] *Marshall* v. *United States*, 360 U. S. 310 (1959); *Janko* v. *United States*, 366 U. S. 716 (1961); *Irvin* v. *Dowd*, 366 U. S. 717 (1961); *Rideau* v. *Louisiana*, 373 U. S. 723 (1963); *Estes* v. *Texas*, 381 U. S. 532 (1965). Cf. *Shepherd* v. *Florida*, 341 U. S. 50 (1951) (concurring opinion); *Stroble* v. *California*, 343 U. S. 181 (1952).

[6] *Fay* v. *Noia*, 372 U. S. 391 (1963); *Townsend* v. *Sain*, 372 U. S. 293 (1963). "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. * * * Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment; if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay* v. *Noia*, 372 U. S. 391 (1963).

to inflammatory publicity surrounding notorious trials, and in the hope that in some measure *amici* may be of assistance to the Court in performing its delicate task of assuring that "the conclusions to be rendered in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print"[7] while "refusing to sacrifice freedom of press to the whims of judges,"[8] this brief is filed.

The written consent of the parties to this appearance *amicus* has been obtained and filed with the Clerk of the Court.

Statement of Facts[9]

On December 21, 1954, petitioner, Samuel H. Sheppard, was convicted of murder in the second degree for the slaying of his wife after a sensational jury trial which captivated the attention of the nation.

Marilyn Sheppard, petitioner's pregnant young wife, had been bludgeoned to death in the bedroom of her lakeshore home during the early morning hours of July 4, 1954. Petitioner told police and testified in court that he had been wakened from his sleep on a couch in the downstairs living room by a noise or cry from upstairs, ascended the stairs, and was knocked unconscious while grappling with an unidentifiable white form standing next to his wife's bed. He further stated that upon recovering, he pur-

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[7] *Patterson* v. *Colorado*, 205 U. S. 454, 462 (1907).

[8] Douglas, J., *The Public Trial and the Free Press*, 33 Rocky Mt. L. Rev. 1 (1960).

[9] Except as otherwise indicated, the facts have been taken from an agreed pretrial order set out in full in the opinion of the district court; the pretrial order is reprinted in the appendix to this brief at 2a-6a.

sued the form out of the house, to be again knocked out while struggling on the shore. Petitioner has consistently denied guilt from the date of the murder until and including the present time. He at first denied, but later admitted having had sexual relations with a former employee of the hospital upon whose staff petitioner served as a doctor of osteopathic surgery. The prosecution contended that this affair was the motive for premeditated murder, although the jury verdict did not support a finding of premeditation.

Petitioner was arrested for murder on July 30, 1954; he was admitted to bail and indicted a few days later, on August 17, 1954. He remained in custody thereafter until his trial. The nine-week trial began on October 18, 1954; the jury began its deliberations on December 17, 1954 and five days later a verdict of guilty of murder in the second degree was returned. Petitioner was thereafter sentenced to life imprisonment in the Ohio Penitentiary.

The news coverage of the murder, the pretrial investigation and the subsequent trial was massive, detailed, pervasive, inflammatory, colorful and "not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media."[10] The trial and pretrial publicity which permeated the atmosphere in which petitioner stood trial for murder was succinctly described by the Ohio Supreme Court in reviewing his conviction:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps

[10] S. 23, majority opinion of Sixth Circuit Court of Appeals. Throughout this brief, the prefix "S" followed by a page number refers to the appendix attached to the petition for certiorari. A page number followed by an "a" refers to the appendix attached to this brief, and the prefix "R" followed by a page number refers to the transcript of the record.

> unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts Building were equipped for broadcasters and telecasters. In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life." 165 Ohio St. 293, 294, 135 N. E. 2d 340, 342 (1956).

An adequate summary of the barrage of publicity which inundated the community before and during petitioner's murder trial is beyond the scope of this statement of facts.[11] For purposes of this Court's review of the petitioner's habeas corpus application, however, the damaging trial and pretrial publicity may be categorized as follows:

1. Publicity relating to the strength of the state's case or the guilt of the accused, procured or cooperated in by state law enforcement authorities.[12]

2. Publicity relating to testimony of witnesses not offered at trial by the prosecution.[13]

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[11] Examples of some of the newspaper clippings, photographs and editorials which appeared in Cleveland journals are appended to the petition for certiorari and this brief. All of these materials which appeared in Cleveland newspapers between the dates of the murder and petitioner's conviction are collected in bulk in five green scrapbooks certified to this Court by the Court of Appeals. Additional examples are discussed in the argument, *infra*.

[12] E.g., S. 110, S. 125, S. 126, S. 127, 54a-55a.

[13] E.g., S. 109, S. 110, S. 126, S. 127, 13a-14a, 44a-45a, 47a.

3. Publicity relating to evidence which would have been inadmissible if offered at trial.[14]

4. Publicity which made celebrities of the trial jurors.[15]

5. Publicity charging guilt or attacking the character of the accused.[16]

Because of the inflammatory atmosphere generated by the adverse publicity, defense counsel moved for a continuance, change of venue and mistrial both before and repeatedly during the trial.[17] All such motions were denied by the trial court.[18]

During the course of the jury empanelling, 13 of the 64 prospective jurors examined were dismissed for cause because they had prejudged the guilt or innocence of the accused.[19]

While the jurors who were ultimately empanelled were sworn to impartiality, eleven of the twelve who returned the verdict admitted exposure to the pretrial publicity,[20] one had paid particular attention to each detail of the case offered by the news media, the better to discharge his duties as a juror,[21] and the twelfth juror, although asserting that,

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[14] E.g., S. 119, S. 120, 10a, 12a, 13a, 21a, 37a, 54a.

[15] E.g., S. 103, S. 105, S. 106, S. 107, S. 108, S. 128.

[16] E.g., S. 115, S. 116, S. 117, S. 118, S. 119, S. 120, S. 121, S. 122, S. 123, S. 124, S. 125, S. 126, S. 129, 23a, 24a, 30a, 58a, 60a.

[17] R. 4, 119, 818, 1352, 1614, 1617-18, 1633, 2355, 3719, 5009, 6815.

[18] R. 1352-1354.

[19] R. 46, 48-49, 180, 284, 288, 331, 336, 338, 740, 746, 884-5, 1023-4, 1043-4, 1157, 1161, 1511.

[20] R. 52, 184, 347, 352-3, 418, 437, 440, 461, 475, 482, 750, 762, 1114, 1214, 1240, 1306, 1342, 1464-5, 1492, 1547.

[21] R. 61-2.

during the period of more than three months between the murder and the commencement of the trial, she had heard nothing about the case, admitted receiving the Cleveland Press daily at her home.[22]

The trial court did not sequester the jury; consequently, all of the jurors were permitted to return to their homes when court was not in session during the nine-week trial.

Since his conviction and the denial of his motion for new trial, petitioner's attempt to obtain a new trial has been the subject of sustained litigation for the past eleven years. Both his conviction and the denial of his motion for new trial were affirmed by the Court of Appeals for Cuyahoga County, Ohio.[23] The Ohio Supreme Court dismissed an appeal from the decision affirming the denial of a new trial,[24] and affirmed the conviction,[25] two judges dissenting. Application for certiorari was denied by this Court[26] and his application for rehearing was also denied.[27] Petitioner's

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[22] R. 124, 127-8, 142.

[23] *State* v. *Sheppard*, 100 Ohio App. 345, 128 N. E. 2d 471 (1955); *State* v. *Sheppard*, 100 Ohio App. 399, 128 N. E. 2d 504 (1955).

[24] *State* v. *Sheppard*, 164 Ohio St. 428, 131 N. E. 2d 837 (1956).

[25] *State* v. *Sheppard*, 165 Ohio St. 293, 135 N. E. 2d 340 (1956).

[26] *Sheppard* v. *Ohio*, 352 U. S. 910 (1956). Justice Frankfurter's memorandum opinion concurring in the denial of certiorari, however, was careful to point out that "[s]uch denial of his petition *in no wise implies that this Court approves the decision of the Supreme Court of Ohio* [denying petitioner's claim that the publicity surrounding his trial deprived him of due process of law]. It means and means only that for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision." (Emphasis and bracketed material supplied.) 352 U. S. 910, 911 (1956).

[27] *Sheppard* v. *Ohio*, 352 U. S. 955 (1956).

subsequent petition for a writ of habeas corpus to the Ohio Supreme Court was denied.[28]

On April 11, 1963, petitioner filed an application for a writ of habeas corpus in the United States District Court of the Southern District of Ohio, charging that his conviction was constitutionally defective in a number of respects, including a denial of due process of law resulting from the adverse newspaper publicity before and during his trial. On July 15, 1964, the district judge concluded, upon examining the trial and pretrial publicity and other matters, that petitioner did not have a fair trial and that his conviction was, therefore, inconsistent with the United States Constitution, ordered his release on bail from the Ohio Penitentiary where he had been confined under a life sentence since his conviction in 1954, and granted the State of Ohio sixty days within which to take further action against petitioner.[29]

Respondent appealed the order of the United States District Court which voided the state court conviction. On May 5, 1965, the Sixth Circuit Court of Appeals (two judges for the majority and one dissenting) reversed the judgment of the District Court and remanded petitioner to the custody of respondent.[30] Thereafter, a petition for rehearing was denied and on July 26, 1965, the Court of Appeals stayed the mandate pending application for certiorari to this Court.

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[28] *State ex rel. Sheppard* v. *Alvis*, 170 Ohio St. 551, 167 N. E. 2d 94 (1960).

[29] *Sheppard* v. *Maxwell*, 231 F. Supp. 37 (S. D. Ohio 1964). See pertinent excerpted material from this opinion reprinted at pp. 1a-53a, *infra*.

[30] The opinion of the Court of Appeals is reported at 346 F. 2d 707 (6th Cir. 1965) and is reproduced in the appendix to the petition for certiorari at S. 1.

Petition for writ of certiorari was filed August 24, 1965 and was granted on November 15, 1965.[31] The petitioner remains at large on bail.

Summary of Argument

In protecting due process of law, this Court has frequently held that, in order to reverse a conviction, actual prejudice to the accused need not be shown where the circumstances were inherently suspect constitutionally. *Tumey* v. *Ohio,* 273 U. S. 510 (1927); *In re Murchison,* 349 U. S. 133 (1955); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *White* v. *Maryland,* 373 U. S. 59 (1963); *Turner* v. *Louisiana,* 379 U. S. 466 (1965). This principle has been recently applied to reverse state criminal convictions on the ground that prejudice was inherent in the trial and pre-trial publicity, without a showing of actual prejudice to the accused. *Rideau* v. *Louisiana,* 373 U. S. 723 (1963); *Estes* v. *Texas,* 381 U. S. 532 (1965).

Certain types of trial and pre-trial publicity, all present in quantity and intensity in the case at bar, are inherently prejudicial to the accused because they necessarily deny him a fair trial by both judge and jury.

These varieties of publicity include:

I. Damaging publicity procured or cooperated in by state law enforcement authorities.

II. Damaging publicity relating to prospective testimony of prosecution witnesses not actually offered at the trial by the prosecution.

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[31] 86 S. Ct. 289 (1965).

III. Damaging publicity describing evidence which, if offered by the prosecution at trial, would have been inadmissible and constitutionally prejudicial.

IV. Publicity which makes well-known personalities of the trial jurors.

V. Damaging publicity of an accusatory nature, whether or not participated in by law enforcement authorities, which charges guilt or attacks the character or reputation of the accused.

Petitioner has, consequently, been denied due process of law and is entitled to habeas corpus relief.

Argument

Although this Court has scrupulously guarded the right of the independent press to publish out-of-court news and editorial comment about pending judicial proceedings virtually without governmental restraint,[32] within the past half-dozen years[33] it has become increasingly aware of, and shown a willingness to deal with, the consequences to fair

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[32] *Bridges* v. *California*, 314 U. S. 252 (1941), established that press freedom was entitled to "the broadest scope that could be countenanced in an orderly society," subject only to the requirement of the clear and present danger standard, defined as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." See also *Craig* v. *Harney*, 331 U. S. 367 (1947); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Wood* v. *Georgia*, 370 U. S. 375 (1962).

[33] But five years after the petitioner's trial and three years after the denial of certiorari on his direct appeal.

trial[34] of untrammelled publicity, both in federal[35] and state[36] criminal prosecutions.

A critical issue in each of these cases has been the kind and quantity of evidence in the record sufficient to show prejudice to the defendant requiring reversal. That this issue should be of prime concern in this area is not a surprising matter, both because prejudice resulting from publicity "may be so subtle that it escapes the ordinary methods of proof," [37] and because of the normal reluctance of a juror to concede his bias before his peers.[38]

In its earliest consideration of cases in this area beginning with *Stroble* v. *California,* this Court apparently re-

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[34] The source of the constitutional command upon state courts to provide fair trials for those accused of crime is, of course, the Due Process Clause of the Fourteenth Amendment, either standing alone or coupled with the Sixth Amendment. Whether the Sixth Amendment as a whole applies to the states through the Fourteenth, cf. *Adamson* v. *California,* 332 U. S. 46, 71-72 (1947) (dissenting opinion); *Griffin* v. *California,* 380 U. S. 609 (1965), or the Fourteenth Amendment includes the "fundamental" portions of the Sixth, *Gideon* v. *Wainwright,* 372 U. S. 335, 342 (1963) or incorporates a concept of "ordered liberty" distinct from the specific guarantees of the Bill of Rights, see *Pointer* v. *Texas,* 380 U. S. 400, 408 (1965) (concurring opinion), state prosecutions must meet the constitutional guarantee of fair trial. *Cox* v. *Louisiana,* 379 U. S. 559, 562 (1965); *Jackson* v. *Denno,* 378 U. S. 368, 377 (1964).

[35] *Marshall* v. *United States,* 360 U. S. 310 (1959); *Janko* v. *United States,* 366 U. S. 716 (1961).

[36] *Irvin* v. *Dowd,* 366 U. S. 717 (1961); *Rideau* v. *Louisiana,* 373 U. S. 723 (1963); *Estes* v. *Texas,* 381 U. S. 532 (1965). Cf. *Shepherd* v. *Florida,* 341 U. S. 50 (1951) (concurring opinion); *Stroble* v. *California,* 343 U. S. 181 (1952).

[37] *Estes* v. *Texas,* 381 U. S. 532, 578 (1965) (concurring opinion).

[38] E.g., *Irvin* v. *Dowd,* 366 U. S. 717, 728 (1961): "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

quired a showing of actual prejudice to the defendant before reversing a conviction on the ground that inflammatory publicity had contaminated the trial.[39] In subsequent cases, however, "the Court departed from the approach it charted in *Stroble* v. *California*" [40] and reversals were accomplished without such a showing upon the ground that prejudice was inherent in the trial and pre-trial publicity.[41]

This latter approach to the protection of due process of law has a long and honorable history in this Court.

In *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927), Chief Justice Taft said:

> "Every procedure which would offer a *possible* temptation to the average man * * * to forget the burden of proof required to convict * * * or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." (Emphasis supplied.)[42]

In *In re Murchison*, 349 U. S. 133, 136 (1955), Mr. Justice Black, speaking for the Court, said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law*

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[39] *Stroble* v. *California*, 343 U. S. 181 (1952); *Irvin* v. *Dowd*, 366 U. S. 717 (1961).

[40] *Estes* v. *Texas*, 381 U. S. 532, 543 (1965).

[41] *Rideau* v. *Louisiana*, 373 U. S. 723 (1963); *Estes* v. *Texas*, 381 U. S. 532 (1965). *Accord*: *Turner* v. *Louisiana*, 379 U. S. 466 (1965); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *White* v. *Maryland*, 373 U. S. 59 (1963).

[42] Quoted with approval in *Estes* v. *Texas*, 381 U. S. 532, 543 (1965).

> *has always endeavored to prevent even the probability of unfairness.* • • • [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States*, 348 U. S. 11, 14." (Emphasis supplied.)[43]

The application of the principle that actual prejudice need not be shown where the circumstances are inherently suspect constitutionally is particularly appropriate in cases involving publicity-poisoned criminal trials. For where such trial contamination is charged, "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." [44]

In cases involving both published confessions[45] and damaging accusatory publicity,[46] this Court has reversed convictions because of the inherently unconstitutional circumstances and not upon a showing of actual prejudice.

The instant case turned upon these considerations in the court below. Although there has never been any material disagreement about the extent or nature of the damaging publicity which inundated the community in which petitioner stood trial for murder, either in the opinions affirming his conviction on direct appeal or those in the collateral proceeding presently before this Court, the majority of the Court of Appeals reversed the finding of the District Court that the newspaper publicity was inherently prejudicial. They held instead that the burden upon the petitioner of

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[43] *Ibid.*

[44] *Id.* at 544.

[45] *Rideau* v. *Louisiana*, 373 U. S. 723 (1963).

[46] *Estes* v. *Texas*, 381 U. S. 532 (1965).

demonstrating the constitutional invalidity of his conviction was "one which must be carried 'not as a matter of speculation but as a demonstrable reality'," upon the authority, *inter alia*, of *Stroble* v. *California*, 343 U. S. 181 (1952),[47] and that petitioner had not met that burden.

In seeking reversal of the decision of the Court of Appeals, *amici* do not claim that all criminal trials conducted in the context of massive publicity are, without proof of actual prejudice, violative of the constitutional command that each accused is entitled to a fair trial by an impartial judge and jury. Rather, *amici* urge this Court to continue on the course it has charted in *Rideau* and *Estes* and rule that certain specific types and varieties of pretrial and trial publicity,[48] all present in quantity and intensity in the case at bar, are inherently prejudicial to the accused, because they necessarily deny him a fair trial by both judge and jury.[49]

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[47] S. 8. This ruling was made despite the implications of *Rideau* v. *Louisiana*, 373 U. S. 723 (1963) and persisted upon application for rehearing after *Estes* v. *Texas* had made it clear that this Court had departed from the *Stroble* approach. 381 U. S. 532 (1965). S. 111-113.

[48] Because the jury was not sequestered in the instant case, but had the opportunity to view and hear the publicity disseminated during trial, both pretrial and trial publicity will be considered together.

[49] Throughout this brief it is presumed that the evil in inflammatory and oppressive news reporting and comment about a highly-publicized crime and trial affects the impartiality of the *judge* as well as the *jury*. For "[t]o deny that bludgeoning or poisonous comment has power to influence or at least to disturb the task of judging is to play make believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with short tenure." *Pennekamp* v. *Florida*, 328 U. S. 331, 359

These varieties of publicity include:

I. Damaging publicity procured or cooperated in by state law enforcement authorities.

II. Damaging publicity relating to prospective testimony of prosecution witnesses not actually offered at the trial by the prosecution.

III. Damaging publicity describing evidence which, if offered by the prosecution at trial, would have been inadmissible and constitutionally prejudicial.

IV. Publicity which makes well-known personalities of the trial jurors.

V. Damaging publicity of an accusatory nature, whether or not participated in by law enforcement authorities, which charges guilt or attacks the character or reputation of the accused.

Each of these matters will be considered in sequence below.[50]

(1946) (concurring opinion). In the instant case, the fact that the trial judge stood for re-election in the middle of the trial, with the political support of the local newspaper which had crusaded vigorously to have petitioner arrested and convicted of murder, needs no further embellishment. See S. 101.

[50] There is no question here about the requisite "state action" to permit this Court to find a federal constitutional violation in each of the varieties of pretrial and trial publicity described above. In (I) the prosecution's active creation of the publicity demonstrates the necessary state action. *Mooney* v. *Holohan*, 294 U. S. 103 (1935). In (II), (III), (IV), and (V), it must be underscored that the constitutional impediment to a trial conducted in the midst of such publicity lies not in the fact that *the independent press published the material in question*, but rather *because the trial court failed to protect the impartiality*

I.

Damaging publicity induced by law enforcement authorities.

There can be no question but that the police, the county prosecutor, the county coroner and other law enforcement officials were the cooperative sources, if not the immediate cause of much of the inflammatory publicity in the news media of which petitioner complains. Quotations from policemen and detectives concerning their opinions as to petitioner's guilt and lack of character,[51] police threats to interrogate him as a suspect without his attorney present,[52] assertions by the prosecution's medical expert that petitioner's claimed injuries had been falsified,[53] publication of "mug shots" of petitioner which could only have come from official jail records,[54] published conclusions of the police and prosecutors that they had "convicting evidence" of petitioner's guilt,[55] and predictions of a "bombshell witness" (with a detailed description of his prospective direct testimony) to be produced at the trial by the prosecution[56]

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of the tribunal by granting the continuances, change of venue or mistrial repeatedly sought by defense counsel.

The argument that such matters are within the sound discretion of the trial court is hopelessly irrelevant because the judge was required to make his discretionary rulings at a time when he was as subject to the prejudicial atmosphere created by the press as was the jury. See discussion in footnote 49, *supra*.

[51] E.g., S. 110, S. 126, 56a.

[52] 54a. Cf. *Escobedo* v. *Illinois*, 378 U. S. 478 (1964).

[53] 54a-55a.

[54] E.g., S. 125.

[55] 60a-61a.

[56] E.g., S. 127.

(but who ultimately never testified in court) are illustrative examples. One police captain even urged petitioner's arrest for murder in a public statement from Miami where he had been vacationing, thousands of miles from the scene of the local investigation.[57]

It seems clear enough that

> "To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice." [58]

That such conduct on the part of law enforcement authorities is prevalent in most highly-publicized trials, either to obtain a climate of community opinion in which conviction is likely or to accommodate the press because of weakness or the hope of political favor, cannot seriously be doubted.[59]

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[57] 56a.

[58] *Stroble* v. *California*, 343 U. S. 181, 201 (1952) (dissenting opinion).

[59] E.g., *Stroble* v. *California*, 343 U. S. 181 (1952) (prosecutor released confession to press even before defendant had completed his statement); *Shepherd* v. *Florida*, 341 U. S. 50 (1951) (newspapers published confession of defendant and attributed information to sheriff; confession never offered at trial); *Irvin* v. *Dowd*, 366 U. S. 717 (1961) (prosecutor and police officials issued intensively publicized press releases stating that petitioner had confessed to six murders); *Rideau* v. *Louisiana*, 373 U. S. 723 (1963) (accused interviewed in jail by sheriff for television). And see official account of opinion-molding and toadying to news media pressure by Dallas law enforcement authorities in the *Report of The President's Commission on the Assassination of President John F. Kennedy (1964)*, pp. 231-242.

The need, so far as criminal due process is concerned, is compelling and urgent. It remains for this Court to announce a rule of conduct for law enforcement authorities which will make costly their participation in trial by newspaper. Reversal of convictions where unconstitutional conduct by law enforcement authorities pervaded the proceedings has been used effectively by this Court as a deterrent to such conduct.[60] A presumption of inherent unconstitutionality in a highly publicized trial where law enforcement authorities actively participated in the inflammatory press releases would assist materially in eliminating the practice of "anticipatory trial by newspapers"[61] which currently impairs our administration of criminal justice.

II.

Damaging publicity describing prosecution evidence which varies materially from that introduced at trial by the prosecution.

The record in the instant case is replete with prosecution evidence offered to the community by the news media but which never was offered in the actual trial. Charges by a police captain in command of the Cleveland police homicide bureau that petitioner was a "bare faced liar" in his sworn

[60] E.g., *Mapp* v. *Ohio*, 367 U. S. 643 (1961) (evidence obtained by illegal search and seizure); *Beck* v. *Ohio*, 379 U. S. 89 (1964) (unlawful arrest); *Griffin* v. *California*, 380 U. S. 609 (1965) (comment by prosecutor on failure of defendant to testify); and see *Mooney* v. *Holohan*, 294 U. S. 103 (1935); *Alcorta* v. *Texas*, 355 U. S. 28 (1957); *Napue* v. *Illinois*, 360 U. S. 264 (1959); *Brady* v. *Maryland*, 373 U. S. 83 (1963).

[61] *Irvin* v. *Dowd*, 366 U. S. 717, 729 (1961) (concurring opinion).

testimony[62] (although he never appeared as a rebuttal witness for the state at the trial), and newspaper revelation of the direct testimony of a prospective prosecution "bombshell witness" (who never testified in court)[63] are but two colorful examples.

This case bears witness to the wry comment of Mr. Justice Frankfurter, concurring in *Pennekamp* v. *Florida*, 328 U. S. 331, 362 (1946):

> "Cases are too often tried in newspapers before they are tried in court, and the cast of characters in the newspaper trial too often differs greatly from the real persons who appear at the trial in court and who may have to suffer its distorted consequences."

Quite apart from the question of the active participation of the police and prosecutor in the dissemination of such matter to the community at large,[64] the danger to due process of law caused by such publication is evident.

As Mr. Justice Jackson, concurring in *Shepherd* v. *Florida*, 341 U. S. 50, 52 (1951), has pointed out:

> "When such events take place in the courtroom, defendant's counsel can meet them with evidence, arguments, and requests for instructions and can at least preserve his objections on the record.
>
> "But neither counsel nor court can control the admission of evidence if unproven, and probably unprovable [evidence is] put before the jury by news-

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[62] S. 110, 47a.

[63] S. 109, 44a-45a.

[64] Discussed *supra*, pp. 17-19.

papers and radio. Rights of the defendant to be confronted by witnesses against him and to cross-examine them are thereby circumvented. * * *" (Bracketed material supplied.)

The prejudice to the defendant from such unoffered testimony in the news media is infinitely greater than if the same evidence were offered in court with appropriate due process safeguards. "[T]he propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." [65]

Under such circumstances, a presumption of prejudice to the accused is as clearly justifiable as though the evidence were offered in court without affording the defendant the opportunity to object to its introduction, make a record for appeal, confront witnesses, cross-examine, or subpoena additional witnesses to rebut such evidence.

The violence to due process is patent.

III.

Damaging publicity describing prosecution evidence which would be inadmissible in court.

Closely allied to the prejudicial effect of prosecution witnesses whose direct testimony was communicated by the news media to the public, but who never appeared in court to subject themselves to cross-examination, is the dissemination of evidence which clearly cannot be offered in court because, by its very nature, it is prejudicially inadmissible.

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[65] *Patterson* v. *Colorado*, 205 U. S. 454, 463 (1907).

Such material abounds in the case at bar. For example, the publication of petitioner's pretrial refusal to subject himself either to "lie detector" or "truth serum" tests by the police, coupled with the editorial suggestion that such suspicious conduct was indicative of his guilt[66] undoubtedly did incalculable damage to petitioner's credibility, which, it must be noted, was the principal question presented to the jury.

Whether or not the evidence would have been inadmissible in court because of the well-known unreliability of "lie detectors" and "truth serum,"[67] or for the constitutional reasons that comment upon such refusal would invade (a) his Fifth Amendment privilege to refuse to testify against himself[68] or (b) his Sixth Amendment right to have his guilt or innocence determined by an impartial tribunal rather than by such "scientific" substitutes,[69] it is clear that the entire question was mooted by the pretrial publication of such prejudicial matters, before defense counsel had an opportunity to object to its introduction in court. The tactical dilemma in which petitioner's trial counsel found himself as a result of such prejudicial pretrial publicity is well illustrated by his compelled failure to object to the introduction of such damaging evidence in court—evidence which was well known to the entire community already and which he would only have re-emphasized by objecting—and

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[66] S. 119, 120, 10a, 12a, 13a, 21a, 37a, 54a.

[67] *Ohio* v. *Smith*, 113 Ohio App. 461, 462-3 (Lucas 1960); *Parker* v. *Friendt*, 99 Ohio App. 329, 335-338 (Cuyahoga 1954); *Freeman* v. *New York Central R. R. Co.*, 15 Ohio Op. 2d 187, 190 (App. Lucas 1960) and see Annotation, 23 ALR 2d 1308 for collected cases.

[68] See *Griffin* v. *California*, 380 U. S. 609 (1965).

[69] *Ohio* v. *Smith*, 113 Ohio App. 461, 463 (Lucas 1960).

the subsequent determination by the Court of Appeals that the constitutional question had been waived by his conduct.[70]

It must be emphasized that the claim of constitutional infirmity made by *amici* here is not that the lie detector and truth serum testimony was admitted into evidence (a question which the Court of Appeals determined had been waived by the conduct of defense counsel), but rather, that the pretrial publication of such evidence was so inherently prejudicial that defense counsel's timely motions for continuance, change of venue, and later, mistrial, should have been granted by the trial court as a constitutional necessity.

IV.

Publicity which makes celebrities of the trial jurors.

There can be little doubt that the jurors who sat as the trier of fact in the instant case became well-known in the community in which the trial took place as a result of the spotlight of publicity focused upon them by their selection as talesmen. The court permitted them to be photographed by press photographers in the courtroom and the jury room, prominent display of the photographs, names and addresses of the jurors appeared frequently on the front pages of the press[71] and feature articles about them, their dress, their families and their deliberations appeared in the news media with sufficient frequency to remove the jurors from the obscurity they had known before their associa-

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[70] S. 47.

[71] S. 103, 105.

tion with this case and add color to the community pageant which was petitioner's murder trial.[72]

Since the jury was not sequestered, it may be presumed that the jurors were aware of the treatment accorded them by the news media during the trial.

This Court has most recently had occasion to examine the psychological impact of intense publicity upon the jurors in *Estes* v. *Texas*.[73] While the issue presented there involved televising trial proceedings, many of the same considerations apply to the case at bar.

"Where pretrial publicity of all kinds has created intense public feeling which is aggravated by" intense publicity focused on the jury, "the nerve center of the fact-finding process," those jurors "cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused" a juror, "realizing that he must return to neighbors who saw" or read detailed accounts of "the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused • • • '."

"Moreover, they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets."[74]

If our jury system is to continue to have meaning, jurors must retain the anonymity which permits them to function best as representatives of their community in performing

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[72] S. 106, 107, 108, 128.

[73] 381 U. S. 532 (1965).

[74] *Id.* at 545-46.

the delicate task of fact-finding. When this fragile balance has been upset by the communications media, the Sixth and Fourteenth Amendment guarantee of a fair trial by an impartial jury becomes meaningless.

V.

Accusatory publicity which charges guilt or attacks the character or reputation of the accused.

One fact jumps from the pages of the voluminous record in the case at bar with astonishing clarity. Seldom has such a zealous journalistic campaign been waged, first to arrest, and then to convict, an accused. Some of the varieties of trial by newspaper have already been chronicled above. Using only the language of the majority of the court below which found *no* constitutional infirmity in the trial and pretrial proceedings, the journalistic product has been alternately described as "shameful journalism," "certainly not conducive to the judiciary's continuing concern for the freedom that the press insists should at all times be accorded to it," [75] "violent and colorful language," [76] "not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media," [77] "shabby reporting" [78] and "flamboyant and sometimes shabby pre-trial exhibitions of the press." [79]

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[75] S. 5.

[76] S. 14.

[77] S. 23.

[78] S. 23.

[79] S. 32.

It may well be that newspapers may be expected to perform no more nobly than they did in the early days of our country.[80] But the technological improvements in the communications media in the past two hundred years make similar excesses exceedingly more dangerous to due process of law and the administration of criminal justice than did the limited technology of former times.

The fact which isolates the pretrial and trial publicity in the instant case from that in many other highly-publicized criminal trials, however, is the single-minded attempt by the news media to convict petitioner of the murder of his wife. By the use of slashing editorials,[81] biting cartoons,[82] maudlin feature stories[83] and slanted news articles,[84] both before and during the trial, petitioner was continually accused of the murder of his wife, lying to the police, inhibiting the criminal investigation, and using his social position and friends in high places to conceal his dirty work. The victim was characterized as a devoted mother and dutiful wife, while petitioner was portrayed as a selfish philanderer who indulged himself in extravagant purchases while denying his wife necessities.[85]

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[80] See letters of Thomas Jefferson as set out in Padover, Democracy, 150-151, reported in *Bridges* v. *California*, 314 U. S. 252, 270, fn. 16 (1941): "I deplore * * * the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. * * * These ordures are rapidly depraving the public taste."

[81] S. 115, S. 116, S. 117, S. 118, S. 119, S. 120, S. 121, S. 123, S. 124.

[82] S. 122, S. 129.

[83] S. 126.

[84] S. 125, S. 127.

[85] 60a.

During the trial, radio broadcaster Robert Considine stated on a network program that petitioner's denial of guilt reminded him of the denials of Alger Hiss when Hiss was convicted of perjury,[86] and Walter Winchell, also on a network radio broadcast, proclaimed that a girl in New York then under arrest for armed robbery had revealed that petitioner was the father of her illegitimate child.[87]

Despite our nation's cultural and historic dedication to the First Amendment principle of freedom of expression, by word and in print, the news media must be reminded of the awful power which is theirs; they must come to understand that "a trial is not a 'free trade in ideas' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market,'" [88] that "legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." [89]

This Court should hold that accusatory publicity which charges the defendant with guilt and attacks his character is inherently prejudicial, a denial of due process of law, and will require reversal of any subsequent conviction. Such a ruling would impress the news media, voluntarily and without judicial compulsion, to recognize their responsibilities toward the courts which protect their freedoms; further, it would serve as a warning to those who have a stake in preserving convictions obtained in the trial courts, that cynical use of the freedom of the press as a weapon to obtain a conviction will not be tolerated.

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[86] R. 3723.

[87] R. 5427.

[88] *Bridges* v. *California*, 314 U. S. 252, 283 (1941) (concurring opinion).

[89] *Id.*, at 271.

CONCLUSION

Amici have urged the constitutional invalidity of the conviction of the petitioner because the trial court failed to protect the accused from the inherently prejudicial publicity which saturated the community in which he stood trial. For this reason, *amici* urge this Court to reverse the decision of the Sixth Circuit Court of Appeals and grant the petitioner's application for a writ of habeas corpus. In doing so, this Court will have the opportunity to correct at last an egregious denial of criminal due process and, at the same time, provide working solutions for some of the difficult and delicate problems of free press and fair trial which currently beset the administration of criminal justice.

Respectfully submitted,

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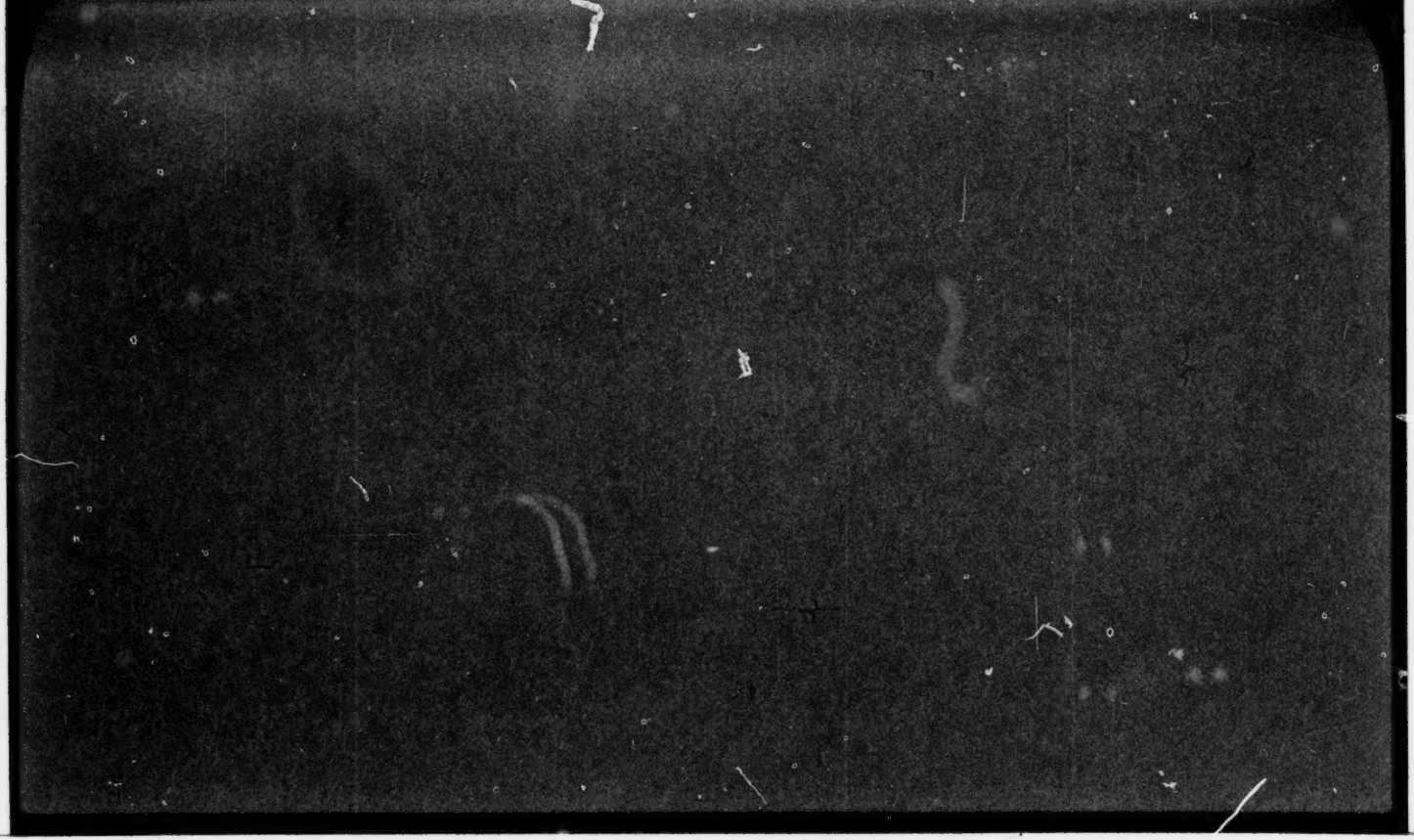
APPENDIX



APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil No. 6640. Decided July 15, 1964

SHEPPARD,

Petitioner,

—v.—

MAXWELL, WARDEN, ET,

*Respondent.**

WEINMAN, CHIEF JUDGE. This matter is before the Court upon a petition for a writ of habeas corpus filed against the Warden of The Ohio State Penitentiary in Columbus, Ohio, where petitioner is incarcerated pursuant to a judgment of the Court of Common Pleas of Cuyahoga County, Ohio, upon a conviction of murder in the second degree.

When the Court took this matter under advisement, a pretrial conference was held to discuss the procedures to be followed in presenting the issues in the case. The purpose of that conference, and similar ones which followed, was to expedite the case in its preparation and presentation for final determination. As a result of the first conference, it was agreed that all preliminary proceedings would be by pre-

* Only excerpts from the opinion of the court related to trial and pretrial publicity are reprinted here. The opinion in full may be found at 231 F. Supp. 37 (S. D. Ohio 1964).

trial orders; those orders to be by agreement of counsel and/or by order of the Court.

One of the pre-trial orders agreed upon and filed by counsel for the parties sets forth the history of the case. That history, with the references to exhibits attached to the pre-trial order omitted, is as follows:

"Petitioner, Samuel H. Sheppard, was in July, 1954, a resident of Bay Village, Ohio, a suburb on the west side of Cleveland. He was a doctor of osteopathic medicine, specializing in Surgery, and a member of the staff of the Bay View Hospital. He was thirty years of age and was married to Marilyn Reese Sheppard, also thirty. They had been married for nine years and had one son, aged seven. Petitioner and his family lived in a house on the shore of Lake Erie, which house was owned by Marilyn. Petitioner was associated in the practice of medicine with his father and two older brothers, all doctors. He was in comfortable financial circumstances.

"On the night of July 3, 1954, petitioner and his wife entertained friends, Don and Nancy Ahearn, in their home. The Ahearns left at approximately 12:30 a. m., July 4, 1954; Marilyn saw them to the door, for petitioner was or appeared to be asleep on a couch in the living room. The evening had been a congenial one, and the Ahearns observed no indications of hostility between petitioner and his wife (who was pregnant) at any time during the evening. In fact, there were overt manifestations of affection between them.

"Shortly before 6:00 A. M. a telephone call was received from petitioner by J. Spencer Houk, mayor of Bay Village and a friend of petitioner. Houk lived two houses distant

from the home of petitioner. Houk heard petitioner say:

" 'My God, Spence, get over here quick, I think they have killed Marilyn.'

"Houk dressed and with his wife, Esther, drove within a short time the few hundred feet to petitioner's home. Upon arrival the Houks found petitioner on the first floor of the house. His face showed some injury, and he complained of pain in his neck. Esther Houk went up to the bedroom, at the suggestion of petitioner, to check on the condition of Marilyn Sheppard. She found Marilyn lying in a pool of blood on the bed. She was dead. The room was covered with splattered blood. It was determined that she had suffered some thirty-five blows about the head by some blunt instrument, causing death. There was some conflict as to how long she had been dead when discovered by the Houks.

"The story given by petitioner to police and at the trial, was substantially as follows: As he was sleeping on the couch, he was awakened by a noise coming from the second floor. He thought he heard his name called. He went up the stairs, which was dimly lit by a light in the hall. He recognized only a white 'form' standing next to the bed where his wife slept. He grappled with the form, and was struck on the back of the neck which rendered him unconscious. Before losing consciousness petitioner heard loud moans, as if from someone injured. When petitioner recovered consciousness, he examined his wife, found or thought that she was dead, determined that his son (in an adjacent room) had not been harmed, and then, hearing noise of some sort on the first floor, ran down. He saw a form running out the door of the house nearest to Lake

Erie, and pursued it to the shore. There he struggled again, and again lost consciousness. When he came to, he went back to the house, re-examined his wife, and called Mayor Houk. Petitioner was unable to establish (1) the number of people in the bedroom at the time of the first encounter or the time of said encounter; (2) the duration of his unconsciousness on either occasion, or (3) the sex or identity of any of the single or several assailants he encountered. He stated that his perceptions had been vague because he was asleep at the outset of the chain of events, and unconscious twice as it progressed.

"In the course of interrogations by police and the County Coroner, petitioner was asked if he had had sexual relations with one Susan Hayes, an ex-employee of the hospital, in March, 1954, in Los Angeles. Petitioner denied this, but later admitted it when confronted with her statement of the affair. The state contended that Miss Hayes was the motive for a premeditated murder, but the jury returned a verdict of murder in the second degree.

"The murder of Marilyn Sheppard captivated the attention of news media in an unprecedented manner. Editorials on the first page of a leading Cleveland newspaper, and news media generally, set up a hue and cry for a solution to the crime. An inquest was demanded and held, and petitioner's arrest was suggested most strongly by at least one leading newspaper. On July 30, 1954, petitioner was arrested; he was admitted to bail, and indicted a few days later, on August 17, 1954. He has been in custody ever since.

"The trial began on October 18, 1954, and on December 17 of the same year the cause was submitted to a jury in

the Court of Common Pleas of Cuyahoga County. On December 21st the verdict of guilty of murder in the second degree was returned, and petitioner was sentenced to life imprisonment in the state penitentiary at Columbus, Ohio, where he is now detained in the custody of respondent.

"The details of the trial, which fill over seven thousand pages in the bill of exceptions, are not recited here; it is the understanding of counsel for both sides that it was not the purpose of this history to describe the voluminous evidence.

"On January 3, 1955, the trial court overruled a motion for new trial which had been based on numerous assignments of error occurring during trial and deliberation * * *.

"On May 9, 1955, the trial court denied a supplemental motion for new trial on ground of newly discovered evidence and based upon the affidavit of Paul Leland Kirk, a criminologist, who claimed to have demonstrated that blood tests made in the murder room proved the existence of blood which did not come from the defendant or the deceased. This evidence was not obtained until after the verdict had been returned.

"On July 20, 1955,[1] the Court of Appeals of Cuyahoga County affirmed the conviction of petitioner; and on July 25, 1955 the same Court affirmed the denial of the second motion for new trial * * *.

"On May 31, 1956, the Ohio Supreme Court affirmed the action of the Court of Appeals as to the case in chief, but did not discuss or pass upon the alleged newly discovered evidence. Two Judges dissented, expressing the view that Sheppard should be accorded a new trial * * *.

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[1] It is a minor point, but the Court notes that several of the dates of decisions are incorrectly stated.

"On November 14, 1956, the Supreme Court of the United States denied a petition for certiorari; application for rehearing was denied on December 19, 1956 • • •.

"On September 5, 1960, Chief Justice Weygandt denied an application for a writ of habeas corpus in the Ohio Supreme Court; the petition therefore was dismissed on May 5, 1961.

"On April 11th, 1963, petitioner filed a petition for a writ of habeas corpus in this Court, which is the action giving rise to this order.

"Petitioner, Samuel H. Sheppard, has at all times maintained that he was not guilty of the murder of his wife, and that he knew no more about said death than he told at the trial."

• • • • •

(1) *Was the publicity before trial and/or during trial such that it violated petitioner's constitutional rights?* (issues numbered 3, 4, 5, 6, 7 and 8). With regard to this issue, counsel have submitted into evidence, by agreement, the following documents, materials and stipulated facts:

1. A copy of the petition for a writ of certiorari to the United States Supreme Court, *Sheppard* v. *Ohio,* Number 352, October Term, 1956, and the Appendix to that petition. There was, of course, no stipulation as to the accuracy, factual or legal, of the allegations and arguments contained in the petition. However, it was agreed that the exhibits reproduced in the Appendix accurately portrayed the documents and materials which they purported to represent.

2. Pages 3723 to 3725, pages 4266 to 4268 and pages 5427 to 5430 of the Bill of Exceptions.

3. Five volumes of green covered scrap books of news clippings from the Cleveland Press, the Cleveland News (which has since merged with the Cleveland Press) and the Cleveland Plain Dealer. These scrap books contain substantially all of the clippings relating to the Sheppard case which were published by these three newspapers during the period from July 1954 through December 1954.

4. The fact that there was published in all three Cleveland newspapers previously referred to, and particularly on September 23, 1954, 25 days before the selection of a jury began, a list of 75 veniremen who had been drawn as prospective jurors in the Sheppard case, giving the full name and street address of each juror listed.

5. The fact that the 13 petit jurors who heard the evidence and decided petitioner's case were allowed to go to their homes each night during the trial, and were not sequestered or kept apart until after the court's charge, at which time the jury was committed to the custody of two bailiffs and were thereafter kept under constant guard and supervision during their deliberations and until their verdict had been returned in open court.

6. The fact that the trial judge, before the commencement of the trial, made certain arrangements with respect to the seating whereby a major portion of the courtroom where the case was to be tried was assigned to the news media.

Prior to commencement of trial, counsel for petitioner made a number of motions for change of venue or for continuance. The trial judge held these motions in abeyance until after the jury was selected; after which he overruled each of the motions.

Newspaper publicity before trial. The first question to be considered is whether the trial judge erred in overruling the aforesaid motions and proceeding with trial in view of the newspaper publicity before trial. It would be impractical to quote each newspaper article which bears upon this question; therefore, the Court will set forth only those articles and headlines which it believes to be most relevant:

"STATE PREPARES CHARGE AGAINST BAY MURDERER"

"NEW SEARCH IS ORDERED FOR CLEWS"

" 'The state is already preparing its case against the killer of Mrs. Marilyn Sheppard.'

"This statement was made today by Assistant County Prosecutor John J. Mahon as he directed a surprise new search of the Bay Village home in which the 30-year-old clubwoman was beaten to death Sunday morning.

"Mahon sharply criticized the refusal of relatives to permit the immediate questioning of the victim's husband, Dr. Samuel Sheppard, also 30.

"While the prosecutor spoke, Dr. Sheppard, his injured neck supported by a brace, was being taken out of Bay View Hospital in a wheelchair to attend his wife's funeral * * *."

Cleveland Press, July 7, 1954, p. 1.

"TESTIFY NOW IN DEATH, BAY DOCTOR IS ORDERED"

"A forthwith subpena commanding Dr. Sam Sheppard, husband of the clain [sic] Bay Village woman, to appear at the county prosecutor's office for questioning was issued today.

"It was hastily issued by Coroner Samuel R. Gerber following a session at the doctor's bedside in Bay View Hospital.

"Deputy Sheriff Carl Rossbach entered the injured osteopath's room in the hospital which is operated by his family, in an effort to question him about the events leading to his wife's death.

"William J. Corrigan, Cleveland criminal defense attorney retained by Dr. Sheppard's family, went in, too.

"A few minutes later, Rossbach stalked out and reported to Coroner Gerber.

"Dr. Gerber angrily wrote out the subpena and handed it to Rossbach. 'Serve it forthwith,' he commanded.

"Rossbach went back into the room to attempt to resume the interrogation.

"The dramatic development came immediately after Assistant County Prosecutor John J. Mahon took control of the murder investigation and issued an abrupt ultimatum:

"Dr. Sheppard must come downtown to the prosecutor's office 'voluntarily to make a statement concerning the crime.'

"If the osteopath refuses, Mahon said, a coroner's inquest will be convened at the Morgue immediately, and Dr. Sheppard will be subpenaed and compelled to testify.

Opinion of the District Court

". . . These developments came as Dr. Stephen Sheppard brother-in-law of the clain [sic] clubwoman, told reporters that his brother was eager and anxious to aid the investigation and was now physically able to withstand questioning.

"He added that William J. Corrigan, prominent Cleveland criminal defense lawyer retained by the family, was 'in complete charge from now on.'

" • • •

" 'In my twenty-three years of criminal prosecution, I have never seen such flagrant stalling as in this case by the family of Dr. Samuel Sheppard,' Mahon said.

" • • • ."

Cleveland Press, July 8, 1954, p. 1.

"DOCTOR RE-ENACTS STORY OF MURDER; REJECTS LIE TEST"

"Doctor Samuel H. Sheppard declined to submit to a lie detector test for questioning about the slaying of his attractive wife, it was disclosed today • • • ."

Cleveland News, July 9, 1954, p. 1.

"DOCTOR RE-ENACTS TRAGEDY"

"HE BARS LIE TEST FOR PRESENT"

"Flanked by two attorneys Dr. Samuel H. Sheppard today re-enacted his version of the murder of his pretty wife, Marilyn—and repeated it, detail by detail, word for word, over and over again.

"Earlier he had refused for the second time to take a lie detector test in 'my present emotional state.'

" • • • ."

Cleveland Press, July 9, 1954, p. 1.

"TOO MUCH TIME LOST"

"Within memory no murder case in this part of the country has prompted so much discussion or speculation as that of Mrs. Sheppard.

"A good part of it centers quite naturally around the circumstances of the killing itself—in a quiet suburban setting —and its attendant mysterious elements.

"A good part likewise centers around the protective ring set up by members of the Sheppard family, which in some respects has tended to add to rather subtract from the speculation that has expanded the case to such vast proportions.

"Also the apparent fumbling of investigative authorities on both the municipal and county levels has added to the intensity of interest—and has raised many additional questions.

"Any time a factor of special attention, or privilege, or special protection is introduced into any case it is bound to produce increased and critical attention.

"In the Sheppard murder case many of these factors are present against the original background of mystery, and it is therefore not unnatural that it occupies such intense and critical notice around the whole community.

"But the principal problem is the fact, that, for whatever reasons, the investigative authorities were slow in getting started, fumbling when they did, awkward in breaking through the protective barriers of the family, and far less aggressive than they should have been in following out clews, tracks, and evidence.

"There is nothing that helps block a solution to a murder more than a cold trail, and it is this, as much as anything, that causes such wide critical appraisal of the Sheppard case.

"Now that the investigative authorities appear finally to have catalyzed themselves into action and broken through some of the protective barriers, they ought to make up in redoubled effort the time they have already lost."

Cleveland Press, July 9, 1954, p. 14.

"QUIZ DOCTOR FOR 7 HOURS"

"• • •

"Deputy Sheriff Carl Rossbach renewed his demand that the 30-year old osteopath submit to a lie detector test.

"'He doesn't have to if he doesn't want to,' Rossbach said, 'but I intend to keep on asking until he agrees.'

"• • • ."

Cleveland Press, July 10, 1954, p. 1.

"DOCTOR CALLS SECOND LIE TEST REFUSAL FINAL'

"• • •

"Dr. Samuel H. Sheppard again late yesterday refused to take a lie detector test in the investigation of the brutal murder of his pretty wife, Marilyn.

"Assistant County Prosecutor Thomas J. Parrino told reporters at the end of a nine-hour questioning of Dr. Sheppard: 'I felt that he was now ruling it out completely.'

"• • • ."

Cleveland Plain Dealer, July 11, 1954, p. 1

"PUSHES FOR SHEPPARD LIE TEST"

"DOCTOR IS WELL ENOUGH NOW, GERBER SAYS"

"Still on the trail of the elusive motive for the murder of Mrs. Marilyn Sheppard 10 days ago, investigators today concentrated on a possible 'other woman' angle.

"AT THE SAME TIME, CORONER SAMUEL R. GERBER AGAIN URGED THE SLAIN WOMAN'S HUSBAND, DR. SAMUEL H. SHEPPARD, BAY VILLAGE OSTEOPATH, TO SUBMIT TO A LIE DETECTOR TEST.

" 'If Dr. Sheppard has recovered sufficiently to go back to work at the Bay View Hospital he is well enough to take a lie detector test,' Dr. Gerber said.

" • • • • "

Cleveland News, July 13, 1954, p. 1.

"PAINESVILLE WOMAN'S STORY OPENS NEW SHEPPARD QUIZ"

"SAYS DOCTOR'S WIFE WANTED TO GET DIVORCE"

"A Painesville woman late today sent police off at a new tangent in their search for the mysterious slayer of Mrs. Marilyn Sheppard.

"THE NEW WITNESS IN THE MURDER CASE WAS MRS. JESSIE DILL, 23, MOTHER OF TWO CHILDREN. SHE WAS QUESTIONED IN THE PAINESVILLE POLICE STATION FOR TWO HOURS BY BAY VILLAGE POLICE.

"Mrs. Dill told reporters she had met a woman she is positive was Marilyn Sheppard on the beach at Fairport Harbor Monday, June 14.

"'She seemed to be unhappy and asked me where my husband was,' Mrs. Dill said. 'I told her I was divorced and she said "that's what I ought to do." She said she had attempted to divorce her husband in California four years ago but his relatives had talked her out of it.'

"Mrs. Dill gave police and reporters the name of a man mentioned by the woman she identified as Mrs. Sheppard. The man had not previously entered the murder investigation.

"Mrs. Dill said the women [sic] she identified as Mrs. Sheppard told her she was to have a baby, and she was afraid if she divorced her husband her 7-year-old son, Chip, would be taken away from her.

"• • • •"

Cleveland News, July 15, 1954, p. 1.

"THE FINGER OF SUSPICION"

"The worst thing about the tragic mishandling of the Sheppard murder investigation is the resulting suspicion.

"Why was it mishandled, people ask.

"You can't blame them.

"In this community generally, murder investigations are conducted with intelligence, efficiency and impartiality.

"The record is good.

"The detectives on the Homicide Squad in the Cleveland

Police Department, for instance, know their job. They have a national reputation.

"Same with the coroner.

"Thanks to his close co-operation with Western Reserve University, and thanks to the voters who authorized the best equipment and facilities, the county has top standing in the relatively new field of scientific crime investigation.

"And the sheriff's office and the prosecutor's office both have good reputations for integrity and determination in solving crimes.

"What happened, then?

"Two things stood in the way of the usual complete and unfettered investigation that the citizens of Greater Cleveland have come to expect as the natural course of events.

"ONE was the hostility of Bay Village officials to any 'outsiders' in this case.

"They rebuffed the usual assistance immediately offered by Cleveland police experts in solving murders.

"SECOND was the unusual protection set up around the husband of the victim, the sole witness, according to later reports, who could start the investigation on the right track.

"The protection was twofold. It came from his family and it came from his lawyer. It was unusual; to say the least.

"And then, worst of all, no law enforcement official, Bay or county, took any leadership in the face of these unusual circumstances.

"No one.

"The result of all this fumbling and delay, of course, was

to start gossip, to launch rumors, to spread suspicion thick as glue.

"It was bad for everybody. Everybody, that is, except the murderer.

"What can be done, now?

"It doesn't make much difference who runs the show. The important thing is that justice is done.

"First logical step would be a meeting of all the law enforcement agencies involved.

"Let them select a leader, a single responsible boss for this particular case.

"Let him serve notice that protection, special favors and fancy ultimatums by lawyers are out from here on.

"Maybe it's too late to start again.

"BUT EVERY FURTHER MOMENT OF FUMBLING IS HELPING A MURDERER ESCAPE."

Cleveland Press, July 16, 1954, p. 12.

"SHEPPARD SET FOR NEW QUIZ"
"GETTING AWAY WITH MURDER"
"AN EDITORIAL"

"What's the matter with the law enforcement authorities of Cuyahoga County?

"Have they lost their sense of reason?—or at least inexcusably set aside the realization of what they are hired to do, and for whom they work?

"If ever a murder case was studded with fumbling, halting, stupid, uncooperative bungling-politeness to people whose place in this situation completely justified vigorous

searching, prompt and effective police work—the Sheppard case has them all.

"Was the murder of Mrs. Sheppard a polite matter?

"Did the killer make a dutiful bow to the authorities and then proceed brutally to destroy the young child-bearing wife?

"Why all of this sham, hypocrisy, politeness, criss-crossing of pomp and protocol in this case?

"Who is trying to deceive whom?

"From the very beginning of this case—from the first hour that the murder became known to the authorities by a telephone call from the husband to the town mayor—from that moment on and including this, the case has been one of the worst in local crime history.

"Of course the trail is cold. Of course the clews have been virtually erased by the killer. Of course the whole thing is botched up so badly that head or tail cannot be made of it.

"In the background of this case are friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected, and a whole string of special and bewildering extra-privileged courtesies that should never be extended by authorities investigating a murder—the most serious, and sickening crime of all.

"The spectacle of a whole community watching a batch of law enforcement officials fumbling around, stumbling over one another, bowing and scraping in the presence of people they ought to be dealing with just as firmly as any

other persons in any other crime—that spectacle is not only becoming a stench but a serious threat to the dignity of law enforcement itself.

"Coroner Sam Gerber was never more right than when yesterday he said that the killer must be laughing secretly at the whole spectacle—the spectacle of a community of a million and a half people brought to indignant frustration by Mrs. Sheppard's killer in that white house out in Bay Village.

"Why shouldn't he chuckle? Why shouldn't he cover up, shut up, conceal himself behind the circle of protecting people?

"What's the matter with us in Cuyahoga County? Who are we afraid of? Why do we have to kow-tow to a set of circumstances and people where a murder has been committed?

"It's time that somebody smashed into this situation and tore aside this restraining curtain of sham, politeness and hypocrisy and went at the business of solving a murder—and quit this nonsense of artificial politeness that has not been extended to any other murder case in generations."

Cleveland Press, July 20, 1954, p. 1.

"ISN'T THIS MURDER WORTH AN INQUEST?"

And in a later edition, the same editorial was headlined:

"WHY NO INQUEST? DO IT NOW, DR. GERBER"

"AN EDITORIAL"

"Why hasn't County Coroner Sam Gerber called an inquest into the Sheppard murder case?

"What restrains him?

"Is the Sheppard murder case any different from the countless other murder mysteries where the coroner has turned to this traditional method of investigation?

"An inquest empowers use of the subpena.

"It puts witnesses under oath.

"It makes possible the examination of every possible witness, suspect, relative, records and papers available anywhere.

"It puts the investigation itself into the record.

"And—what's most important of all—it sometimes solves crimes.

"What good reason is there now for Dr. Gerber to delay any longer the use of the inquest?

"The murder of Marilyn Sheppard is a baffling crime.

"Thus far it appears to have stumped everybody.

"It may never be solved.

"But, this community can never have a clear conscience until every possible method is applied to its solution.

"What, Coroner Gerber, is the answer to the question—

"Why don't you call an inquest into this murder?"

Cleveland Press, July 21, 1954, p. 1.

"TIME TO BRING BAY SLAYING INTO OPEN"

"Too many days have passed without positive results in the several investigations of the Bay Village hack-slaying. Undoubtedly the suburb's police officials feel they have conducted the best possible inquiry; county officials and Coroner Samuel R. Gerber's office also undoubtedly feel that

they have acted effectively. But there's been no sign at all of breaking the stalemate over the brutal slaying of Mrs. Marilyn Sheppard.

"We are forced to take note that Dr. Samuel Sheppard, husband of the victim has rejected suggestions of both lie detector and truth serum tests, and has submitted to questioning only when his family and his lawyer have agreed he might.

"Before charges and counter-charges, fights among officials and jealousies smother all efficiency, wouldn't it be wise to bring the whole matter out into the open, with subpenaing and examination of witnesses under oath, for example, at the county's crime laboratory at Western Reserve University? It's time all groups get together as one to find, or attempt to find the solution to this baffling crime."

Cleveland News, July 21, 1954, p. 1.

"GET THAT KILLER"

"It is high time that strenuous action be taken in the Sheppard murder case.

"This newspaper fails to see how bickering among those who have been investigating the 18-day-old mystery can aid in the final aim—to find the murderer, whoever he may be.

"County Coroner Samuel R. Gerber, though he has failed to produce the person who brutally murdered Mrs. Marilyn Sheppard in the bedroom of her Bay Village home, has worked long and hard, and deserves the appreciation of the whole community.

"But it is obvious that Dr. Gerber needs help. The Cleveland police department is equipped to give it. Its crime

laboratories and investigators are among the best in the business. It has no Bay Village friendships which might prove embarrassing.

"True, the case is cold as ice. There has, in our opinion, been a noticeable lack of cooperation on the part of the dead woman's husband, Dr. Samuel M. [sic] Sheppard, who has refused to take a lie detector test, and who yesterday rejected proposals that he submit to a 'truth serum' test.

"He had already been subjected to interrogation, he said; he could not face further interrogation because he is still emotionally upset, and he was reluctant to put himself in a position where he might involuntarily incriminate innocent people.

"The last noble sentiment would, we feel, have been far more noble if Dr. Sheppard had said:

" 'I will be happy to do anything within my power to bring my wife's murderer to justice. If a lie detector test would help, by all means bring it on. If a "truth serum" test would convince you that I have told police all I know in an honest effort to apprehend the murderer, I am at your service, gentlemen.'

"Just as it is easy to 'second-guess' a ball game, it is easy to second-guess a murder investigation.

"It is clear, now, that, because of the social prominence of the Sheppard family in the community, and friendships between the principals in the case and the law enforcement bodies of Bay Village, kid gloves were used throughout all preliminary examinations.

"Possibly the 'bushy-haired man' would have been apprehended long before this if the crime had been investigated with the vigor it deserved; perhaps some other answer

might have been found to solve one of the most brutal murders in the history of Greater Cleveland.

"It is gratifying that the Cleveland police department has accepted the Bay Village Council's invitation to step into the mystery, even at this late date, after once dropping out of the case for some unexplained reason. Competent detectives may yet be able to muster enough evidence to produce the killer.

"Finding the killer should be of the greatest satisfaction to Greater Cleveland, to Bay Village, and to Dr. Samuel Sheppard."

Cleveland Plain Dealer, July 22, 1954, p. 1.

"SLAIN WIFE REVEALED DATES OF DOCTOR, TALK OF DIVORCE"

"• • •

"The audience of more than 200, mostly Bay Village housewives, applauded when William Corrigan, Dr. Sam's attorney, was forcibly ejected from the hearing after insisting vigorously on his right to insert remarks in the record.

"Coroner Samuel R. Gerber, who ordered Corrigan's expulsion, was hugged, kissed and cheered by the spectators after he recessed the three-day hearing to be reconvened later at the County Morgue • • •."

"• • •."

Cleveland Press, July 26, 1954, p. 1.

"CORRIGAN EJECTED AMID CHEERS"

"MOVE FOLLOWS RUNNING CLASH WITH GERBER"

"INQUEST IS RECESSED; OUSTED LAWYER VOWS TO SUE OVER INCIDENT"

"Spectators cheered wildly yesterday as William J. Corrigan, criminal lawyer representing Dr. Samuel H. Sheppard, was half dragged from the room in the closing moments of the Marilyn Sheppard murder inquest in Bay Village.

"As the tumult subsided in the Normandy School auditorium-gymnasium, Coroner Samuel R. Gerber indefinitely recessed the inquiry into the brutal hack-murder of Dr. Sheppard's 31-year-old wife before dawn July 4.

"• • • •"

Cleveland Plain Dealer, July 27, 1954, p. 1.

"WHY DON'T POLICE QUIZ TOP SUSPECT?"
"AN EDITORIAL"

"You can bet your last dollar the Sheppard murder would be cleaned up long ago if it had involved 'average people.'

"They'd have hauled in all the suspects to Police Headquarters.

"They'd have grilled them in the accepted, straight-out way of doing police business.

"They wouldn't have waited so much as one hour to bring the chief suspect in.

"Much less days.

"Much less weeks.

"Why all this fancy, high-level bowing and scraping, and super-cautious monkey business?

"Sure it happened in suburban Bay Village rather than in an 'ordinary' neighborhood.

"So what?

"What difference should that make?

"When they called the Cleveland police in everybody thought:

" 'This is it. Now they'll get some place.'

"Now we'd have vigorous, experienced, expert, big-time action.

"They'd get it solved in a hurry.

"They'd have Sam Sheppard brought in, grill him at Police Headquarters, like the chief suspect in any murder case.

"But they didn't.

"And they haven't.

"In fairness, they've made some progress.

"But they haven't called in Sam Sheppard.

"Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases as he pleases, Sam Sheppard still hasn't been taken to Headquarters.

"What's wrong in this whole mess that is making this community a national laughing stock?

"Who's holding back—and why?

"What's the basic difference between murder in an 'ordinary' neighborhood and one in a Lake Rd. house in suburban Bay Village?

"Who is afraid of whom?

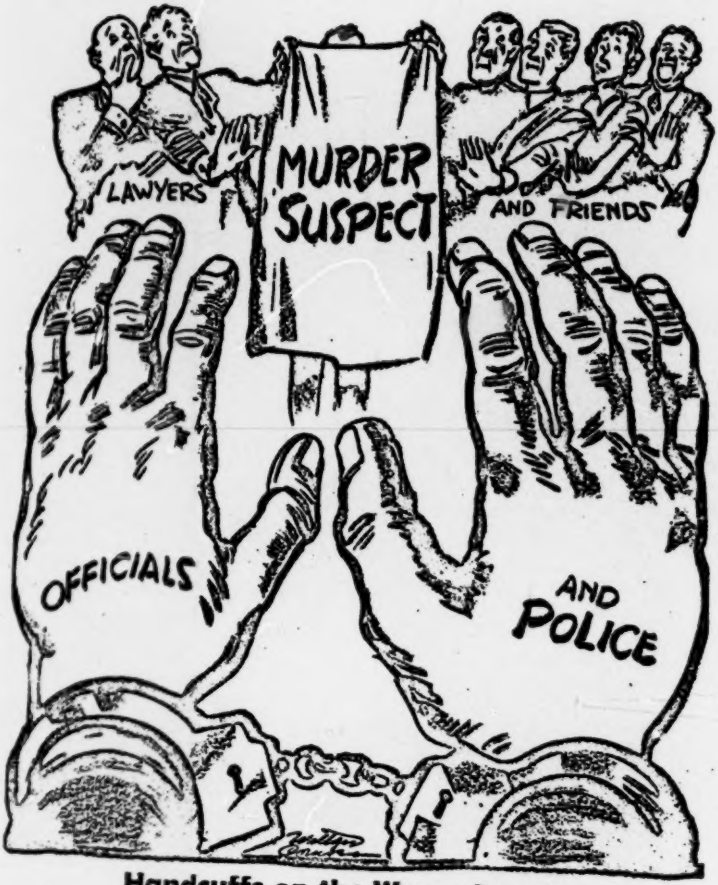
"It's just about time that somebody began producing the answers—

"And producing Sam Sheppard at Police Headquarters."

Cleveland Press, July 28, 1954, p. 1.

Newspaper Cartoon

(See opposite) ☞



Handcuffs on the Wrong People?

Opinion of the District Court

Newspaper Cartoon

(See opposite) ☞

"I Will Do Everything in My Power to Help Solve This Terrible Murder."
—*Dr. Sam Sheppard*

"WHY ISN'T SAM SHEPPARD IN JAIL?"

And in a later edition the headlines were:

"QUIT STALLING—BRING HIIM IN"
"AN EDITORIAL"

"Maybe somebody in this town can remember a parallel for it. The Press can't.

"And not even the oldest police veterans can, either.

"Everybody's agreed that Sam Sheppard is the most unusual murder suspect ever seen around these parts.

"Except for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling into the circumstances of his wife's murder.

"From the morning of July 4, when he reported his wife's killing, to this moment, 26 days later, Sam Sheppard has not set foot in a police station.

"He has been surrounded by an iron curtain of protection that makes Malenkov's Russian concealment amateurish.

"His family, his Bay Village friends—which include its officials—his lawyers, his hospital staff, have combined to make law enforcement in this county look silly.

"The longer they can stall bringing Sam Sheppard to the police station the surer it is he'll never get there.

"The longer they can string this whole affair out the surer it is that the public's attention sooner or later will be diverted to something else, and then the heat will be off, the public interest gone, and the goose will hang high.

"This man is a suspect in his wife's murder. Nobody yet has found a solitary trace of the presence of anybody else in

his Lake Rd. house the night or morning his wife was brutally beaten to death in her bedroom.

"And yet no murder suspect in the history of this county has been treated so tenderly, with such infinite solicitude for his emotions, with such fear of upsetting the young man.

"Gentlemen of Bay Village, Cuyahoga County, and Cleveland, charged jointly with law enforcement—

"THIS IS MURDER. THIS IS NO PARLOR GAME. THIS IS NO TIME TO PERMIT ANYBODY—NO MATTER WHO HE IS—TO OUT-WIT, STALL, FAKE, OR IMPROVISE DEVICES TO KEEP AWAY FROM THE POLICE OR FROM THE QUESTIONING ANYBODY IN HIS RIGHT MIND KNOWS A MURDER SUSPECT SHOULD BE SUBJECTED TO—AT A POLICE STATION."

"The officials throw up their hands in horror at the thought of bringing Sam Sheppard to a police station for grilling. Why? Why is he any different than anybody else in any other murder case?

"Why should the police officials be afraid of Bill Corrigan? Or anybody else, for that matter, when they are at their sworn business of solving a murder.

"Certainly Corrigan will act to protect Sam Sheppard's rights. He should.

"BUT THE PEOPLE OF CUYAHOGA COUNTY EXPECT YOU, THE LAW ENFORCEMENT OFFICIALS, TO PROTECT THE PEOPLE'S RIGHTS.

"A murder has been committed. You know who the chief suspect is.

"You have the obligation to question him—question him thoroughly and searchingly—from beginning to end, and

not at his hospital, not at his home, not in some secluded spot out in the country.

"But at Police Headquarters—just as you do every other person suspected in a murder case.

"What the people of Cuyahoga County cannot understand, and The Press cannot understand, is why you are showing Sam Sheppard so much more consideration as a murder suspect than any other person who has ever before been suspected in a murder case.

"Why?"

Cleveland Press, July 30, 1954, p. 1.

"BUT WHO WILL SPEAK FOR MARILYN?"

"It's perfect, you think at first, as you look over the setting for the Big Trial.

"The courtroom is just the size to give a feeling of coziness and to put the actors close enough to each other so that in moments of stress the antagonists can stand jaw to jaw and in moments of relaxation can exchange soft words of camaraderie.

"Modern enough for this 'See-Hear' age, with the microphone, the loud speakers on the walls, and the blazing lights for the TV cameras before and after court sessions.

"Yet somberly dignified enough to carry the authentic decor of the traditional court of justice.

"Almost inadequate, old-fashioned hanging light fixtures. Dark furnitture. [sic]. A high bench for his honor, the judge. So high that if he slouches a bit just his head is visible.

"A bit of plaster has fallen from the ceiling over the clerk's desk. The unrepaired spot gives a touch of the dignity of age.

"And on the floor at the end of the trial table—a cuspidor.

"Ah, you think, only a master arranger would have remembered that.

" 'The cuspidor. Put it here.'

"Perfect, you think at first, a masterpiece of setting the stage for the dramatic action of the Big Trial.

"Then it hits you. No, there's something missing.

"What?

"Can what seems to be missing be found in the cast of characters.

"Ah, the cast. Superb, you think at first.

"And complete. Not a character missing.

"And so real, you think. Just like you would expect to see. Why if you didn't know these were people and this was a real setting you would think you were watching a drama on television or a mystery play at a theater.

"His honor, the judge. A quaint Welsh accent. Quick, mobile features that can pass so rapidly through sternness, annoyance, patience and charming friendliness.

"And the chief counsel for the defense. Granite faced, shaggy haired. Now disdainful, now quizzical, now disbelieving, now coaxing, now threatening, now bored.

"These provide the perfect background for the most perfect character of all—the accused. Was there ever more perfect typing? Was there ever a more perfect face for the enigma that is the Big Trial?

"Study that face as long as you want. Never will you get from it a hint of what might be the answer when the curtain rings down on this setting and on these characters. Is he the one? Did he do it?

"Plus of course, the other characters. The accused's two brothers. Prosperous, poised. His two sisters-in-law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan.

"Yes, you think. They wouldn't be more true-to-life if this Big Trial were a television drama.

"Then it hits you again. No there's something—and someone missing.

"What is it? Who is it. Who's still off stage? Waiting perhaps for a cue to come on.

"In the hallway outside the courtroom you stop to talk to Detective Chief James McArthur. He's an old timer at Big Trials. So you ask him. Isn't there someone, something missing?

" 'Sure,' says the detective chief. 'There always is. I'll tell you.

" 'It's the other side, the representatives of what in this case will be officially known as the corpus delicti, in other words, the body of the crime, in still other words—Marilyn Reese Sheppard.

" 'There is no grieving mother—she died when Marilyn was very young.

" 'There's no revenge-seeking brother nor sorrowing sister. Marilyn was an only child.

" 'Her father is not here. Why he isn't, is his own personal business.'

"What then, you wonder, will be the other side.

"It will be there, Inspector McArthur reassures. He opens a thick brief case he carries daily to the courtroom.

" 'Here' he says, 'are the statements and resumes of testimony that will be given by state's witnesses. Here are the

theories and details of the evidence found by dozens of detectives in weeks of work.

" 'Here is the complete story of Marilyn Reese Sheppard. How she lived, how, we think, she died. Her story will come into this courtroom through our witnesses. Here is how it starts: Marilyn Sheppard, nee Reese, age 30, height 5 feet, 7 inches, weight 125 pounds, brown hair, hazel eyes. On the morning of July 4 she was murdered in her bedroom. . . . '

"Then you realize how what and who is missing from the perfect setting will be supplied.

"How in the Big Case justice will be done.

"Justice to Sam Sheppard.

"And to Marilyn Sheppard."

Cleveland Press, October 23, 1954, p. 1.

[This article is included with "Newspaper publicity before trial" although it is recognized that the trial had commenced before it was published; however, the jury had not yet been sworn and the court believes this article to be relevant to the question being considered.]

ADDITIONAL NEWSPAPER HEADLINES: Published before trial, most of which appeared on front pages.

"QUIT WEARING GUN, DOCTOR TOLD"

"DR. SHEPPARD BACKS AWAY FROM 'CRIME DOCTOR' TALK"

"SAYS MRS. SHEPPARD HAD PLANNED DIVORCE"

"SHEPPARD DENIES TRYST WITH WOMAN TECHNICIAN"

"SHEPPARD DENIES AFFAIR, SOBS ON WITNESS STAND"

"KERR URGES ARREST OF DOCTOR; POLICE FIND HOLES IN STORY"

"SLAIN WIFE TALKED OF 'OTHER GIRL' DOCTOR'S MOTHER SAYS"

"GIRL ADMITS AFFAIR, FLIES HERE TO TESTIFY"

"DOCTOR LIES, SUSAN SAYS; TELLS OF GIFTS"

"DR. SAM MADE LOVE BUT DIDN'T TALK ABOUT DIVORCE, SUSAN SAYS"

"STORY OF TECHNICIAN DIFFERENT FROM SHEPPARD'S AT INQUEST"

"DR. SAM FACES QUIZ AT JAIL ON MARILYN'S 'FEAR OF HIM.'"

"15 DETECTIVES GRILL DR. SHEPPARD IN JAIL"

"POLICE ASSERT COUPLE HAD VIOLENT ROWS"

"SCIENCE CUTS THROUGH COVER-UP"

"POLICE END QUIZ AS DOCTOR WINS NO-TALK STRIKE"

"DOCTOR BALKS, QUIZ HALTED"

"5 'OTHER WOMEN' LINKED TO DOCTOR"

"SIXTH WOMAN IS LINKED IN DOCTOR QUIZ"

"[GRAND] JURY WEIGHS EVIDENCE 40 MINUTES AND ACTS"

"THE SHEPPARD STORY: MURDER MYSTERY FULL OF CONTRADICTIONS"

The Court does not deem it necessary to analyze in detail the above quoted newspaper editorials, articles and headlines or the remainder of the five volumes of clippings submitted into evidence. Suffice it to say that each of the three Cleveland newspapers repeatedly printed material which strongly suggested and, in fact, urged petitioner's guilt. Indicative of the suggestion of guilt was the repeated and extensive coverage given to petitioner's refusal to submit to a lie detector test or to receive an injection of truth serum. Headlines, in addition to those already referred to but still only a sampling of the total, stated:

"DOCTOR VARIES STORY, BARS LIE TEST NOW,"

"DR. SHEPPARD REFUSES TO TAKE TRUTH SERUM IN MURDER PROBE,"

"DOCTOR BARS TRUTH TEST," and
"DR. SHEPPARD BALKS AT TRUTH SERUM TEST."

And particular mention must be made of the editorial in the Cleveland Press titled "BUT WHO WILL SPEAK FOR MARILYN" which was printed just prior to the swearing in of the jury, for it was indeed one of the most prejudicial. Ignoring the fact that it was a cheap, sobsister editorial, it literally screamed for petitioner's conviction.

When the Supreme Court of Ohio considered the question of whether the trial court should have granted a change of venue, *Ohio* v. *Sheppard*, 165 Ohio St., 293, 294-297 (1956), the majority opinion of the Court stated:

"• • • Was the atmosphere in Cleveland as a result of the widespread publicity attendant upon this trial such as to require the trial court to grant a change of venue?

"• • • •

"The law does not require this court to be so naive as to refuse to recognize the great amount of publicity accorded this case from the time of the discovery of the crime up to the present time. Every development has been given the 'full treatment' by the press, radio and television. The interest in each phase of the case has not been confined to the Cleveland area or to Ohio. Syndicated columns and news agency reports have made the case almost as well known in every community of the nation as it is in Cleveland.

"It should be borne in mind, however, that the legal question presented to us is whether the defendant was accorded a fair constitutional trial by an impartial jury which could decide the issues of fact solely upon the consideration of the evidence in the light of the law given it by the court. That question is not to be decided on the volume of the publicity or the tendency such publicity may have had in influencing the public mind generally as to the defendant's guilt or innocence.

"• • • •

"We believe the trial court was justified in those rulings (the overruling of each motion for change of venue). In *Townsend* v. *State,* 17 C. C. (N. S.), 380, 25 C. D., 408, affirmed without written opinion in 88 Ohio St., 584, 106 N. E., 1083, it is said:

" 'The examination of jurors on their *voir dire* affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to the guilt of the defendant of those called for examination for jurors are based on newspaper articles and that the opinions so formed are not fixed but

would yield readily to evidence, it is not error to overrule an application for a change of venue.'

"• • •

"If the jury system is to remain a part of our system of jurisprudence, the courts and litigants must have faith in the inherent honesty of our citizens in performing their duty as jurors courageously and without fear or favor. Of the 75 prospective jurors called pursuant to this venire only 14 were excused because they had formed a firm opinion as to the guilt or innocence of the defendant. A full panel was accepted before this venire was exhausted, and defendant exercised but five of his allotted six peremptory challenges.

"In the light of these facts, and particularly in the light of the fact that a jury was impaneled and sworn to try this case fairly and impartially on the evidence and the law, this court can not say that the denial of a change of venue by the trial judge constituted an abuse of discretion."

The general rule that a change of venue lies within the sound discretion of the trial judge is well settled. The Courts have also agreed that our jury system is based upon the belief of jurors and when jurors testify that they can discount influences of external factors and meet the standard imposed by the Fourteenth Amendment, that assumption is not lightly to be disregarded, *Rideau* v. *Louisiana*, 373 U. S. 723 (1963). However, and this is a factor which the Supreme Court of Ohio failed to consider, when the circumstances are unusually compelling, the assurances of jurors may be disregarded, though the burden of showing essential unfairness is upon the person who claims such injustice and seeks to have the results set aside, *Rideau* v.

Louisiana, supra, and *Adams* v. *United States ex rel. McCann,* 317 U. S., 269, 281 (1942).

How to protect an accused from the prejudicial effect of newspaper publicity is indeed a serious and difficult problem. The United States Supreme Court has jealously guarded the right of an accused to a fair trial by a panel of impartial jurors and when, after a conviction, it is determined that newspaper publicity so prejudiced the minds of the prospective jurors as to preclude a fair trial, the Court has ordered a new trial. That Court has, of course, recognized that jurors do not live in a vacuum and certain cases are by their very nature apt to generate publicity and jurors will probably have formed some impression or opinion as to the merits of the case. This problem was discussed by the Court in *Irvin* v. *Dowd,* 366 U. S., 717 (1961). In that case, a habeas corpus proceeding was brought to test the validity of petitioner's conviction of murder and sentence of death in the Circuit Court of Gibson County, Indiana. Petitioner contended that his conviction had been obtained in violation of the Fourteenth Amendment in that he did not receive a fair trial. Mr. Justice Clark, in delivering the opinion of the Court stated at pages 722-723:

"* * * In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process * * *.

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the in-

terest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court * * *."

The Court, after noting that the jury panel consisted of 430 persons of which the trial judge excused 268 on challenges for cause as having fixed opinions as to the guilt of the defendant, stated at page 727:

"* * * An examination of the 2,783-page *voir dire* record shows that * * * almost 90% of those examined on the point * * * entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty * * *."

The Court then concluded:

"Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community * * * was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box * * *."

And Mr. Justice Frankfurter in his concurring opinion, at pages 729-730, observed:

"* * * One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a

fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception."

This Court, though it recognizes that in the instant case only 14 of the 72 prospective jurors examined stated that they had prejudged the guilt or innocence of the accused, has no compunction in finding that the publicity was so prejudicial to petitioner that the assurances of the jurors must be disregarded for in the words of Mr. Justice Frankfurter, "before they [the jurors] entered the jury box, their minds were saturated by press and radio * * * designed to establish the guilt of the accused."

In a case decided after *Irvin* v. *Dowd, supra,* the Supreme Court held it was a denial of due process of law to refuse the request for a change of venue after the people of the community had been exposed repeatedly and in depth to the spectacle of the defendant personally confessing in detail to the crimes with which he was later charged, *Rideau* v. *Louisiana, supra.* In that case, the Court did not examine the transcript of the voir dire in reaching its determination as to prejudice. The Court said at page 727:

"* * * we do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in

this case required a trial before a jury drawn from a community of people who had not seen or heard Rideau's televised 'interview' * * * ."

The instant case is analogous to *Rideau* in that regardless of what might have been said in the voir dire examination, the community was so prejudiced against petitioner that a fair trial could not be had. See, as one overt example of the prejudice against petitioner, the newspaper reports that the "spectators cheered wildly" and "hugged and kissed" the coroner when he ordered petitioner's counsel ejected from the inquest, supra, at page 31.

As stated in *Delaney* v. *United States,* 199 F. (2d), 107, 112-113 (1 Cir., 1952) by Judge Magruder:

" * * * One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity. This is particularly true in the determination of issues involving the credibility of witnesses."

And as stated by Mr. Justice Jackson, concurring in *Krulewitch* v. *United States,* 336 U. S., 440, 453 (1949):

"The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction."

This Court now holds that the prejudicial effect of the newspaper publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial regardless of their as-

surances or the admonitions and instructions of the trial judge.

Publicity during trial. From the day the trial began, the *Sheppard case* dominated the Cleveland newspapers. It would be impractical to quote extensively from the articles which were published during trial; the Court will present only one. It is indeed a glaring example of prejudicial reporting and appeared on page 1 of the Cleveland Press on November 24. The headlines were:

"SAM CALLED A 'JEKYLL-HYDE' BY MARILYN, COUSIN TO TESTIFY"

The text of the article stated:

"Two days before her death, murdered Marilyn Reese Sheppard told friends that her accused husband, Dr. Samuel H. Sheppard, was 'a Dr. Jekyll and Mr. Hyde.'

"The prosecution has a 'bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper—countering the defense claim that the defendant is a gentle physician with an even disposition.

"One of Mrs. Sheppard's 'Dr. Jekyll and Mr. Hyde' statements was made to Bay Village Mayor J. Spencer Houk as recently as last June, The Press learned.

"Houk, according to his statement to the authorities, had expressed surprise at Marilyn's account of a display of Sam's anger.

" 'You don't know that guy,' he quoted the murder victim as replying. 'He's a regular Dr. Jekyll and Mr. Hyde. . . .'

"Mrs. Sheppard used the 'Jekyll-Hyde' expression frequently in confidential conversations during the past several years, friends and relatives have told the murder investigators.

"THE 'BOMBSHELL WITNESS' IS THOMAS WEIGLE, 26, OF 15897 NELAMERE RD., EAST CLEVELAND, MARILYN'S FIRST COUSIN.

"Weigle and his wife, Marian, and son, Gordon visited Sam and Marilyn Sheppard's home at 28924 Lake Rd., Bay Village, a Sunday in March, 1952.

"The two women were in the kitchen, Weigle related, while he and Dr. Sam were watching a western movie on television. The Sheppards' only son, Sam (Chip) Jr., then five years old, was playing in the room.

"Chip, Weigle said, tapped his father's arm—either playfully or accidentally.

"'SAM'S FACE REDDENED,' WEIGLE CONTINUED. 'HE WHISKED THE BOY UP, TOSSED HIM ACROSS HIS LEGS, AND BEGAN BEATING HIM ON HIS BACK, LEGS AND BUTTOCKS.'

"'AS HE STRUCK THE BOY REPEATEDLY, SAM SAID: "DON'T YOU EVER HIT ME AGAIN . . . . DON'T YOU EVER DO THAT AGAIN!" . . .'

"* * * *."

Thomas Weigle, or the "bombshell witness" as he was characterized by the Cleveland Press, did not testify, as that newspaper had said he would, that petitioner was a "Jekyll-Hyde." However, the damage to petitioner was completed when the newspaper was circulated. As stated by counsel for petitioner in his brief: "It is difficult to imagine any characterization more damaging to a doctor on trial for a monstrous murder." The schizophrenic character in Robert Louis Stevenson's novel was at times a peaceable, respected doctor and at times a bloodthirsty killer. The attempt to analogize petitioner and a schizophrenic murderer is only one example of the type of slanted

and prejudicial newspaper publicity which attended the trial. Other examples are the following headlines:

"CALLS DR. SAM LOVE SLAYER, ASKS DEATH"

"MARILYN'S PICTURES STIR COURT"

"DEFENSE STRESSES 'HOW' NOT 'WHO' TO MARILYN'S DEATH"

"DEFENSE AIMS TO SET WALL OF DOUBT AROUND DR. SAM"

"DOCTOR SAM'S PROWLER STORY HIT"

"LAB MEN READY ATTACK ON SAM"

"DRENKHAN [A Patrolman] RIPS 'PROWLER' VIEW"

"STORY OF ILLICIT ROMANCE WILL CLIMAX TRIAL"

"STATE SPRINGS 2 BLOOD CLEWS"

"HIT DEFENSE 'BURGLARY' PLEA; * * *"

"CORONER IS FIRM UNDER CORRIGAN FIRE"

"CORRIGAN STRUGGLES TO REVIVE 'INTRUDER' AS RECALLED BY SAM"

"TESTIFIES SAM CHANGED STORIES"

"DR. SAM'S SIX STORIES SPIN TANGLED SKEIN"

"ASSERTS STEVE COACHED DR. SAM"

"STATE HITS DR. SAM ON 17 POINTS"

"SHEPPARD DEFENSE AIMED AT CHRISTMAS VERDICT"

"PARRINO RIPS DR. STEVE'S STORY OF SCENE ON MURDER MORNING"

"TRIPS DR. STEVE ON NEW VERSION OF LOOK AT BODY"

—524—

"TESTIMONY OF DR. STEVE SHOWS CHANGE IN STORY"

"DR. STEVE ADMITS 2 ERRORS"

"DR. SAM FACES ATTACK ON LOVES"

"BARE-FACED LIAR KERR SAYS OF SAM" [Kerr did not testify at the trial]

"DR. SAM ADMITS TWO MORE ROMANCES DURING MARRIAGE"

"WITNESS TELLS OF 'FLIRTATIONS' IN STATE QUIZ"

"DR. SAM QUIZZED ON OTHER WOMEN"

"STATE'S LAST WORD; 'SAM FAKED BURGLARY TO COVER UP MURDER'"

In addition to the prejudicial effect of the newspaper publicity, petitioner also alleges error due to certain radio publicity. During the trial, counsel for petitioner advised the trial judge that a broadcaster, Robert Considine, announced over the radio a comparison between petitioner and Alger Hiss. Counsel requested the judge to ask the jury if they had heard the broadcast because of its prejudicial effect. The judge refused and stated:

"THE COURT: • • • Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control everybody.

"MR. MAHON: [an assistant prosecutor] I think that the court has instructed the jury that they are not to read

about it or listen to the broadcasts. It was a general instruction that was given at the time the trial started.

"THE COURT: We are not going to harass the jury every morning.

"MR. CORRIGAN: [petitioner's chief trial counsel] I can't help it, Judge. If you don't that's all right with me. I make my exception.

"THE COURT: It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury, and we must have confidence or the jury system is of no value whatever to anybody.

"MR. CORRIGAN: The jury are human beings and this situation around here is unprecedented in the history of trials in the United States."

Regarding unfavorable publicity during trial, the Court of Appeals for the Sixth Circuit, in *Krogmann* v. *United States,* 225 F. (2d), 220, 228 (1955), stated:

"Unfavorable publicity to a defendant given in newspapers about a pending jury trial is not necessarily grounds for setting aside a verdict, but under certain circumstances may result in prejudice to a defendant so as to cause a mistrial. Generally, an incorrect unfavorable report of the evidence presented against a defendant on a material issue, which comes to the attention of a juror or jurors during the pendency of the trial raises a rebuttable presumption that the rights of the defendant have been prejudiced. The District Judge should ascertain if the report has come to the attention of a juror and if so, take the necessary steps to rebut such presumption, and if not convinced that the presumption has been rebutted, declare a mistrial * * *."

And in *Marshall* v. *United States,* 360 U. S., 310 (1959), the Supreme Court reversed a conviction in the Federal

District Court where some of the jurors saw and read newspaper articles which were prejudicial to defendant. The Court said, at pages 312-313:

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. * * * Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. * * * It may indeed be greater for it is then not tempered by protective procedures."

It must be recalled that the jury in this case was not sequestered until the cause was submitted to them after the charge of the court. It is clear beyond doubt, because of the sheer volume of publicity which attended the trial, that the jury read and heard about the case through the news media.[4] In fact, the record shows, at page 5429 of the Bill of Exceptions, that the trial judge asked if any juror had heard a certain broadcast by Walter Winchell and two jurors replied that they had.[5]

This Court holds there was such a plethora of prejudicial material contained in the newspapers that no admonition or

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[4] On this point, see infra, at pages 526 and 527.

[5] In that broadcast, it was reported that a woman, then under arrest for robbery, had stated that "she was the mistress of Sam Sheppard, and that he was responsible for the birth of a child." Each of the jurors who had heard the broadcast answered "No" to the question: "Would that have any effect upon your judgment?"

charge of the court could vitiate the effect of the publicity. Further, the trial judge committed error when he failed to question the jury regarding the Robert Considine broadcast. It was incumbent upon the judge to take every precaution to insure that highly prejudicial material did not infect the minds of the jury. *Holmes* v. *United States,* 284 F. (2d), 716 (4 Cir., 1960). It has even been held that where there is highly prejudicial publicity, the judge should carefully examine each juror out of the presence of the others to determine the effect of the articles on those who had read them and whether they had discussed the articles with others, *United States* v. *Accardo,* 298 F. (2d), 133, 136 (7 Cir., 1962).

The Court also notes the manner in which the trial judge allocated the courtroom to members of the news media. It is one thing to accommodate the news media; it is quite different when a major portion of the courtroom is reserved for it. Here a comparatively small courtroom was reserved primarily for the news media and the trial became its showpiece. The Supreme Court of Ohio characterized the atmosphere surrounding the trial as "a 'Roman holiday' for the new media." Under such circumstances, the requisite atmosphere for a fair trial could not, and in fact did not, exist.

Any one of the above mentioned factors, i.e., the insidious, prejudicial newspaper reporting, the refusal of the trial judge to question jurors regarding an alleged prejudicial radio broadcast and the carnival atmosphere which continued throughout the trial, would be sufficient to compel the conclusion that petitioner's constitutional rights were violated. But when they are cummulated, this Court cannot, unless it were to stretch its imagination to a point of fantasy, say the petitioner had a fair trial in view of the publicity during trial.

The Court cannot pass to the next claim of error without pausing to comment further on the manner in which the three Cleveland newspapers reported the murder of Marilyn Sheppard and the subsequent events. It is often difficult to draw the line between propriety and impropriety in newspaper reporting. Newspapers have the right and indeed an obligation to the community to advocate and to criticize. But with respect to the Sheppard case, there can be no doubt as to the impropriety in the manner in which it was reported by the Cleveland newspapers. The inflammatory and prejudicial reporting did not subside when the trial began; it continued throughout the trial. And special note must be given to the attempt of the newspapers to influence the jury. It was startling to find photographs of the entire jury and of individual jurors (at times giving their home addresses) in no less than 40 issues of the Cleveland newspapers. The Court need not be naive, and it does not stretch its imagination to recognize that one of the purposes of photographing the jurors so often was to be assured that they would look for their photographs in the newspapers and thereby expose themselves to the prejudicial reporting. Also, the newspapers ran editorials praising the trial judge (he was a candidate for re-election) and published photographs and sketches of him in at least 46 separate issues. This was certainly an attempt to bring him around to their way of thinking.

If ever there was a trial by newspaper, this is a perfect example. And the most insidious violator was the Cleveland Press. For some reason that paper took upon itself the role of accuser, judge and jury. The journalistic value of its front page editorials, the screaming, slanted headlines and the nonobjective reporting was nil, but they were calculated to inflame and prejudice the public. Such a com-

plete disregard for a sense of propriety results in a grave injustice not only to the individual involved but to the community in general. Public officials, the courts and the jury are unable to perform their proper functions when the news media run rampant, with no regard for their proper rule. Numerous responsible newspapers and magazines noted this abuse of freedom of the press and published editorials[6] which were highly critical of the Cleveland newspapers, especially the Cleveland Press.

Freedom of the press is truly one of the great freedoms which we cherish; but it cannot be permitted to overshadow the rights of an individual to a fair trial. As stated by Mr. Justice Jackson in his concurring opinion in *Shepherd* v. *Florida,* 341 U. S., 50, 53 (1951):

"• • • Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial • • •."

On this subject, an often quoted opinion is that of Mr. Justice Frankfurter concurring in *Pennekamp* v. *Florida,* 328 U. S., 331, 354-356 (1945), wherein he stated:

"Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied • • •.

"A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy,

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[6] These editorials are reproduced in the Appendix to the petition for writ of certiorari and are part of the evidence in this case, see supra, page 495.

either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. • • • In plain English freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise • • •." [Footnotes omitted.]

By its actions in the Sheppard case, the Cleveland Press showed no respect for its responsibilities. If ever a newspaper did a disservice to its profession; if ever the cause of freedom of the press was set back, this was it. The failure of that newspaper and the two other Cleveland newspapers to adhere to their responsibilities cannot be permitted to deny petitioner his right to a fair trial.

• • •

Article in The Cleveland Press of July 21, 1954

(See opposite) ☞

The Cleveland Press

The Newspaper That Serves Its Readers

NO. 24030 ** CLEVELAND, WEDNESDAY, JULY 21, 1954 Phone CHerry 1-1111

Home

64 Pages 7 Cents

KNOW KILLER, STORY SAYS

Doctor Bars Truth Test

Cleveland Police Take Over Probe of Bay Slaying

BULLETIN

The Cleveland Police Department today was ordered to take over the Marilyn Sheppard murder investigation by Mayor Celebrezze. Capt. Dave Kerr, homicide squad head, is being recalled from a Florida vacation, to take charge.

The Cleveland Police Department prepared today to take over the 17-day-old investigation of the brutal murder of Mrs. Marilyn Sheppard as Police Chief Frank Story said he "is convinced of the identity of the murderer."

"But the suspect has his story down pat," he added. "And if he stays pat, there isn't much that we can do."

After consulting his attorneys, Dr. Sheppard today refused to submit to a "truth serum" injection to aid the investigation.

Having declared that his "present emotional condition and his present state of fatigue make it impossible for him to agree to a further ordeal of this kind" and that he "cannot face further interrogation," Dr. Sheppard was reported unavailable at Bay View Hospital because he "is in surgery."

Reasons for Refusal

Here are the reasons given by Dr. Sheppard for refusing to submit to a "truth serum" test to aid the investigation of his wife's murder.

The statements were made public by Coroner Samuel Gerber:

"He already had been subjected to interrogation shortly after the crime and while he was under barbiturate sedation. If he had anything to communicate, he believes it would have been communicated at that time.

"He cannot face further interrogation. His present emotional condition and his present state of fatigue make it impossible for him to agree to a further ordeal of this kind.

"He is reluctant to put himself in a position in which he might make statements that would incriminate innocent people."

Fails to Telephone

The 30-year-old osteopath snubbed attempts of Dr. Alan R. Moritz, head of the pathology department of Western Reserve University Medical School, to contact him for a reconsideration request.

Dr. Sheppard failed to telephone Dr. Moritz at a time he had promised to do so.

"We can interpret this as meaning we can expect no further cooperation from Dr. Sheppard in this investigation," declared Coroner Gerber.

This development came as Mayor Celebrezze conferred with Safety Director John McCarmick and Chief Story to determine the extent to which the Cleveland police might "move in" on the unsolved murder.

The city's chief counsel, Jo-

Turn to Page 7, Column 3

Assistant Prosecutor John J. Mahon today asked the wives of Dr. Stephen Sheppard and Dr. Richard Sheppard, brothers of Dr. Samuel H. Sheppard, to come in for questioning in the Marilyn Sheppard murder investigation.

6 U. S. Citizens to Be Released by Chinese Reds

GENEVA, July 21 —(UP)— Red China informed the United States today that it is releasing six American citizens held in China and that the cases of other U. S. citizens detained there are under review.

The United States announced, simultaneously, that it is releasing 15 Chinese students previously detained in the U. S.

The exchange agreement was reached at a meeting here between Alfred Jenkins, a member of the U. S. Indochina Conference Delegation, and Pu Shan of the Chinese Communist Delegation.

The six Americans are: Ernest Kutz, Reuben Lenzer, Linus Lenzbard, John B. Maye, Lawrence Mullin and Alfred Peter Pattison.

The announcement added that "the Chinese Communists' representative stated further that the cases of other detained Americans are still under review. Jenkins expressed the hope that those detained Americans would be released shortly."

BLOODSTAINED trousers worn by Dr. Samuel H. Sheppard when he reported wife's death.

ONE OF MANY MYSTERIES of Sheppard murder case is how this pillow got bloodstained on both sides. Did killer use it to muffle Marilyn Sheppard's outcries? Did he wipe murder weapon or his hands on it?

Story Sure He Knows Identity of Murderer

(Continued From Page One)

seph Crowley, was called into the session.

Detective Chief James McArthur indicated that an early step would be to bring in Dr. Samuel H. Sheppard, the victim's husband, for questioning.

"It won't be an interview," McArthur said. "We don't interview suspects—we interrogate them. And on our own grounds, without their attorneys present."

McArthur awaited definite orders from City Hall before instructing his 20-man homicide detail to take over the case from the nine-man Bay Village police force.

Votes Probe Fund

The Bay Village City Council voted last night to turn over the case to Cleveland police, appropriating $5000 to pay their expenses, and indicating more money would be made available if required.

Celebrezze said his impulse was to have the Cleveland force move into the case without delay, but he would withhold final decision until he studies the exact wording of the Bay Village resolution.

McCormick said he was confident the Cleveland homicide squad could crack the case, and "we probably have to take over."

Story balked, describing the case as "almost beyond solution."

Will Obey Mayor

"But I'll take orders from the mayor," he added.

Story said he wouldn't quibble about taking over the case "if this was a series of murders and the whole community was endangered."

Meanwhile, Dr. Sheppard was under heavy pressure to submit either to a lie detector test or an injection of "truth serum" to aid the investigation.

Dr. Sheppard had previously refused to take a lie detector test because he said he was "emotionally disturbed," and the results might be inaccurate.

Balks at Truth Serum

He also balked when Dr. Moritz suggested the sodium pentothal injection.

Sodium pentothal is a sedative drug which releases the subconscious mind. Under the drug, a patient either tells the truth, what he believes to be the truth, or what he has convinced himself is the truth.

The argument presented to Dr. Sheppard was that, under the drug, questioned by a trained psychiatrist, he might recall some details of the murder morning which would aid investigators in solving the mystery.

That Dr. Gerber did not intend to accept Dr. Sheppard's refusal to submit to further questioning as final was indicated by the fact that the coroner had a sheaf of subpenas in his pocket.

"I have them for use in the Sheppard case, when necessary," Dr. Gerber said. "I don't know when I'll have to get rough, but I'm prepared to do so the moment it will aid the investigation in any way."

Dr. Gerber said he was not prepared to call a formal coroner's inquest, in which witnesses would be compelled to testify under oath, "at this time."

Dr. Moritz told Dr. Sheppard authorities were forced to question some parts of his version of how he heard an outcry from the upstairs bedroom of his home at 28924 Lake Rd., Bay Village, on the murder morning.

The osteopath's account was that he rushed upstairs in time to see a tall, bushy-haired intruder beating his wife to death. He grappled with the killer, Dr. Sheppard said, and was twice knocked unconscious in battles in the hallway and on the beach, where he pursued the madman.

McArthur said he couldn't understand why a bereaved husband would hesitate to do all in his power to assist in trapping the killer—including submitting to a lie test or a "truth serum" injection.

BRUTAL SAVAGERY of the murder of Marilyn Sheppard is demonstrated by these bloodstains on the closet and hall doors of upstairs bedroom in which she was slain. Blood splattered several feet through air.

The Cleveland P

The Newspaper That Serves Its Readers

NO. 24024 ** CLEVELAND, MONDAY, JULY 26, 1954

KERR ASKS DOCTOR

Homicide Capt. David Kerr, flying home from a Miami vacation to join the investigation of the slaying of Mrs. Marilyn Sheppard, recommended today that Dr. Samuel H. Sheppard be arrested "for investigation of murder."

Kerr said the slain woman's husband should be held for interrogation at Central Police Station.

Reached by The Press before he took off from Miami, Kerr said: "If there had been an immediate arrest, the case would have been solved in four hours."

Kerr declared that he wanted to determine who prevented continuous interrogation of Dr. Sam immediately after he reported his wife's murder.

"In homicide investigations," Kerr said, "I treat doctors and lawyers and everyone else just alike."

Police Chief Frank W. Story commented: "That's what should have been done in the beginning, but the situation is more complicated now."

Story said his men have definite evidence which "flatly contradicts" several statements made by Dr. Sheppard under oath at a coroner's inquest which resumed today at the Normandy School in Bay Village.

It was believed that Dr. Sheppard would be recalled to the witness stand to be confronted with these contradictions.

When Dr. Sheppard concluded his testimony Friday, Coroner Samuel R. Gerber ordered him to "hold yourself available at all times."

Dr. Gerber said his inquest would be adjourned indefinitely after today's session, subject to being reconvened at any time.

At the last minute, Dr. Gerber decided to excuse Sam (Chip) Sheppard Jr., six-year-old son of the murdered Marilyn, from testifying.

Chip was asleep next door to his parents' bedroom when his mother was bludgeoned to death July 4 in their home at 28924 Lake Rd. He earlier told Deputy Sheriff Carl Rossbach he hadn't heard anything.

"The boy couldn't add anything," Gerber said.

Miss Susan Hayes, West Coast Sam, gave an account at Los A... Prosecutor Thomas Parrino and ... Robert Schottke which contradicte... pard's witness stand statements.

Chief Story said a May Co. sal... to testify that Dr. Sam purchased ... and a fishing rod at the downto... some time prior to his wife's mur... stand, Dr. Sam said he had no re... purchase. He was not asked abou...

"We are trying to determine w... fishing rod," Story said.

According to Dr. Gerber, th... weapon with which Mrs. Sheppa... more savage blows was "very lik... than a fishing rod."

Story assigned sewer cleaning ...

OVERSIZE PAGE--SEE NEXT FRAME

FOR REMAINDER OF PAGE

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S DOCTOR'S ARREST

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ppard concluded his testimony Friday, R. Gerber ordered him to "hold your- all times."

id his inquest would be adjourned in- today's session, subject to being re- y time.

minute, Dr. Gerber decided to excuse heppard Jr., six-year-old son of the lyn, from testifying.

eep next door to his parents' bedroom er was bludgeoned to death July 4 in 28924 Lake Rd. He earlier told Deputy ossbach he hadn't heard anything.

"The boy couldn't add anything at this time," Dr. Gerber said.

Miss Susan Hayes, West Coast companion of Dr. Sam, gave an account at Los Angeles to Assistant Prosecutor Thomas Parrino and Homicide Detective Robert Schottke which contradicted some of Dr. Sheppard's witness stand statements.

Chief Story said a May Co. salesman was prepared to testify that Dr. Sam purchased two hunting knives and a fishing rod at the downtown department store some time prior to his wife's murder. On the witness stand, Dr. Sam said he had no recollection of a knife purchase. He was not asked about the fishing rod.

"We are trying to determine what happened to the fishing rod," Story said.

According to Dr. Gerber, the chief added, the weapon with which Mrs. Sheppard was struck 25 or more savage blows was "very likely a heavier object than a fishing rod."

Story assigned sewer cleaning experts to check the plumbing and downspouts of the Sheppard home today in a renewed search for the missing murder weapon and Dr. Sam's mysteriously vanished T-shirt.

The police chief made this observation: "The case looks more encouraging than at any time since we took it over. Our hopes for a definite solution are rising."

Detective Chief James McArthur disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section.

The tidy murderer, McArthur said, missed a few specks of blood on the stair risers.

"My conclusion," he added, "is that this blood dripped from the murder weapon."

When to present the 22-day-old murder case to the Cuyahoga County Grand Jury is the subject of constant conferences in the office of Prosecutor Frank T. Cullitan.

58a

Article in The Cleveland Press of July 30, 1954

(See opposite) ☞

SCRIPPS-HOWARD

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NO. 24028 CLE

Why Isn't Sa

(AN EDITORIAL)

Maybe somebody in this town can remember a parallel for it. The Press can't.

And not even the oldest police veterans can, either.

Everybody's agreed that Sam Sheppard is the most unusual murder suspect ever seen around these parts.

Except for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling into the circumstances of his wife's murder.

The Suspect

From the morning of July 4, when he reported his wife's killing, to this moment, 26 days later, Sam Sheppard has not set foot in a police station.

He has been surrounded by an iron curtain of protection that makes Malenkov's Russian concealment amateurish.

His family, his Bay Village friends—which include its officials—his lawyers, his hospital staff, have combined to make law enforcement in this county look silly.

The longer they can stall bringing Sam Sheppard to the police station the surer it is he'll never get there.

The longer they can string this whole affair out the surer it is that the public's attention sooner or later will be diverted to something else, and then the heat will be off, the public interest gone, and the goose will hang high.

This man is a suspect in his wife's murder. Nobody yet has found a solitary trace of the presence of anybody else in his Lake Rd. house the night or morning his wife was brutally beaten to death in her bedroom.

And yet no murder suspect in the history of this county has been treated so tenderly, with such infinite solicitude for his emotions, wit
the young man.

Gentlemen of Bay Village,
Cleveland, charged jointly wit

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OVERSIZE PAGE–SEE NEXT FRAME
FOR REMAINDER OF PAGE

e Cleveland Press

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CLEVELAND, FRIDAY, JULY 30, 1954

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't Sam Sheppard in Jail?

solicitude for his emotions, with such fear of upsetting the young man.

Gentlemen of Bay Village, Cuyahoga County, and Cleveland, charged jointly with law enforcement—

This is murder. This is no parlor game. This is no ime to permit anybody—no matter who he is—to out-vit, stall, fake, or improvise devices to keep away from he police or from the questioning anybody in his right ind knows a murder suspect should be subjected to—t a police station.

The officials throw up their hands in horror at the hought of bringing Sam Sheppard to a police station for grilling. Why? Why is he any different than anybody else in any other murder case?

Why should the police officials be afraid of Bill Corrigan? Or anybody else, for that matter, when they are at their sworn business of solving a murder.

Certainly Corrigan will act to protect Sam Sheppard's rights. He should.

But the people of Cuyahoga County expect you, the law enforcement officials, to protect the people's rights.

A murder has been committed. You know who the chief suspect is.

You have the obligation to question him—question him thoroughly and searchingly—from beginning to end, and not at his hospital, not at his home, not in some secluded spot out in the country.

But at Police Headquarters—just as you do every-other person suspected in a murder case.

What the people of Cuyahoga County cannot understand, and The Press cannot understand, is why you are showing Sam Sheppard so much more consideration as a murder suspect than any other person who has ever before been suspected in a murder case.

Why?

NO. 24037 ** CLEVELAND, TUESDAY, AUGUST 10, 1954 Phone CHerry 1-1111

DOCTOR EVIDENCE IS READY FOR JURY

Investigation Is Nearly Completed

Police have virtually completed their investigation of the July 4 murder of Mrs. Marilyn Reese Sheppard.

Their conclusion is that they have "convicting evidence" to prove that Dr. Samuel H. Sheppard, osteopath husband of the victim, was the killer.

The evidence is being turned over to Prosecutor Frank T. Cullitan and is ready for presentation to the Grand Jury "whenever he sees fit."

These were the statements today of Detective Chief James McArthur, directing the 15-man homicide squad Sheppard murder case detail.

Assistant Prosecutor John J. Mahon said the case would be presented to the Grand Jury for indictment after Dr. Sheppard's preliminary hearing in a magistrate's court.

That hearing has been indefinitely delayed by Chief Defense Counsel William J. Corrigan's charge that his client could not receive a fair hearing in Bay Village Mayor's Court. Trial of this contention is set for 10:15 a. m. Thursday before Common Pleas Judge Frank J. Merrick.

Prosecutor Frank T. Cullitan, Police Chief Frank W. Story and Detective Chief James McArthur conferred at the Criminal Courts Bldg. late today to devise "new strategy" for handling the Marilyn Sheppard murder case. The police were believed to be pressing for early Grand Jury action.

Cullitan said the case is now proceeding satisfactorily, and there is "no hurry" about obtaining an indictment. He said no Grand Jury action is contemplated this week, and he has no plan to bypass the preliminary hearing.

The prosecutor announced that the complete physical examination of Dr. Sheppard at City Hospital last week "substantially confirms the inquest testimony of Dr. Richard Hexter."

Punctured Claim of Injury

Dr. Hexter punctured the claim of Dr. Sheppard's family that he had suffered a serious neck injury in what he claimed was a series of struggles with the killer.

He said Dr. Sam's neck was uninjured when he examined it on the morning of July 4, and the osteopath had only face injuries.

The City Hospital examination supported Dr. Hexter's finding that there was no need for Dr. Sam to wear the protective neck collar which has become his trade mark since his wife's death.

Although Dr. Sheppard has steadfastly denied his guilt, McArthur and Coroner Samuel R. Gerber said a web of physical evidence has traced out his actions on the murder morning.

The investigators have reached the conclusion that Dr. Sheppard struck his wife 25 or more times in a flash of fury.

What sparked off the blind rage is uncertain—but the investigation has developed a pattern of marital strife, punctuated by disputes over "other women" and sporadic talk of possible divorce.

Dr. Gerber said the investigation indicates that Mari-

Turn to Page 7, Column 2

Police Confident of Evidence for Sheppard Trial

(Continued From Page One)

lyn was a devoted mother and dutiful wife, while her husband was a philanderer.

Both McArthur and Dr. Gerber have concluded that the missing murder weapon was thrown into Lake Erie.

The coroner said the waters of the lake were probably used by the killer to wash his victim's blood off his hands and clothes.

It was disclosed today that Dr. Sheppard sometimes brought women guests to Bay Village Hospital to watch him perform delicate brain operations. He was the only osteopathic neuro-surgeon practicing in northern Ohio.

Proud of his skill, Dr. Sam took a 17-year-old Bay Village High School senior to watch him perform a particularly difficult operation. Later, he gave her a complete description of the techniques he employed and the difficulties he encountered.

Dr. Sam was at one time physician for the Bay Village High School football team. Marilyn formerly gave basketball instruction for Bay Village girls at the high school on Saturday mornings.

The 30-year-old osteopath, who resumed operating at Bay View Hospital the day after his wife's funeral, spent his 11th day in the County Jail today.

Homicide detectives made no effort to question him, having concluded that his refusal to discuss the case "on advice of counsel" was final.

Dr. Sheppard admitted intimacies with Miss Susan Hayes, 24, former Bay View Hospital laboratory technician, but declined to discuss his other extra-marital affairs.

He previously testified under oath that Marilyn had urged him to telephone Susan during a Los Angeles trip last March, but altered his story when Miss Hayes returned to Cleveland to contradict his testimony.

Hosts Give Clew

Miss Hayes made her admissions only after Dr. and Mrs.

Dr. Sheppard's impending murder trial.

Mahon said the trial would probably take place this fall.

Sole issue of the Thursday hearing before Judge Merrick is whether Bay Village Council President Gershom M. M. Barber could give Dr. Sheppard a fair preliminary hearing. If Merrick rules otherwise, he will transfer the hearing to another suburban mayor's court or Cleveland Municipal Court.

The presiding magistrate at a preliminary hearing is empowered only to hold a felony defendant for Grand Jury action. However, Prosecutor Cullitan has already made the decision to take the case to the Grand Jury—either following the hearing or on his own initiative.

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Hosts Give Clew

Miss Hayes made her admissions only after Dr. and Mrs. Arthur Miller of Los Angeles, at whose home Dr. Sam and Susan were guests, made a statement to Assistant Prosecutor Thomas Parrino and Homicide Detective Robert Schottke.

The Millers said they had known for years that Dr. Sheppard "didn't take his marriage vows too seriously," but were astonished when he brought "another woman" to their home.

Investigators said that Dr. Sheppard did not lavish expensive gifts or entertainment on his woman friends. He was also "pretty tight" in money matters with his murdered wife, they said.

Some of the furniture which Mrs. Sheppard had asked her husband to replace, when he chose to buy a new Jaguar sports car instead, was removed from the murder home at 28924 Lake Rd. yesterday and taken to the County Morgue on Adelbert Rd.

Dr. Gerber said the murder bed, the downstairs sofa, the chair from Dr. Sam's study and two blood-spattered doors would remain at the morgue until taken to a courtroom for

ing. If Merrick rules otherwise, he will transfer the hearing to another suburban mayor's court or Cleveland Municipal Court.

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